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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1498

REESE HUBBARD,

Petitioner,

vs.

DONNA M. KIEFEL,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETER FITZPATRICK,
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CE 6-3914,

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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APPENDIX A.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.

FEDERAL RULES OF CIVIL PROCEDURE.

RULE 30. *Depositions Upon Oral Examination.*

* * * * *

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is

a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

RULE 43. *Evidence.*

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

RULE 52. *Findings by the Court.*

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and

conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

(b) Amended. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 61. *Harmless Error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 42. *Criminal Contempt.*

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

RULE 39 FEDERAL RULES OF APPELLATE PROCEDURE FOR U. S. COURTS OF APPEAL.

RULE 39. *Costs.*

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs

shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

* * * * *

(c) Costs of Briefs, Appendices, and Copies of Records. The cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

(d) Clerk to Insert Costs in Mandate. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to the mandate at any time upon request of the clerk of the court of appeals.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

STATUTES.

18 U. S. C. A., § 401.

§ 401. *Power of court.*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

18 U. S. C. A., § 1503.

§ 1503. *Influencing or injuring officer, juror or witness generally.*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property

on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

28 U. S. C. A., § 1912.

§ 1912. *Damages and costs on affirmance.*

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs. June 25, 1948, c. 646, 62 Stat. 954.

28 U. S. C. A., § 1913.

§ 1913. *Courts of appeals.*

The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits. June 25, 1948, c. 646, 62 Stat. 954.

28 U. S. C. A., § 1920.

§ 1920. *Taxation of costs.*

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree. June 25, 1948, c. 646, 62 Stat. 955.

28 U. S. C. A., § 1923.

§ 1923. *Docket fees and costs of briefs.*

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

$20 in admiralty appeals involving not over $1,000;

$50 in admiralty appeals involving not over $5,000;

$100 in admiralty appeals involving more than $5,000;

$5 on discontinuance of a civil action;

$5 on motion for judgment and other proceedings on recognizances;

$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs as printing the briefs of the successful party not more than:

$25 where the amount involved is not over $1,000;
$50 where the amount involved is not over $5,000;
$75 where the amount involved is over $5,000.

June 25, 1948, c. 646, 62 Stat. 956; June 18, 1954, c. 304, 68 Stat. 253.

28 U. S. C. A., § 1927.

§ 1927. *Counsel's liability for excessive costs.*

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. June 25, 1948, c. 646, 62 Stat. 957.

AMENDMENTS TO THE UNITED STATES CONSTITUTION.

U. S. C. A. Const. Amend. 6.

Amendment VI—Jury trial for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U. S. C. A. Const. Amend. 7.

Amendment VII—Civil trials.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U. S. C. A. Const. Amend. V.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B.

1. OPINION OF THE DISTRICT COURT, ENTERED FEBRUARY 28, 1966, APPEARING AT 39 F. R. D. 592 (1966).

DONNA M. KIEFEL, *Plaintiff*,

v.

LAS VEGAS HACIENDA, INC., a California corporation, *Defendant*.

No. 63 C 1982.

UNITED STATES DISTRICT COURT
N. D. Illinois, E. D.

Feb. 28, 1966.

ROBSON, *District Judge*.

Plaintiff moves for a new trial and seeks to have the verdict and judgment thereon against her set aside. Several grounds are advanced. The court concludes that one of those grounds is sufficient basis for the granting of a new trial.

The court is of the opinion that plaintiff has not had a fair trial due to the objectionable trial strategy of defendant's counsel. In substance, those tactics consisted of knowingly making prejudicial insinuations in his opening statement which were not substantiated by evidence. Further, he hamstrung plaintiff's counsel in precluding the appearance of an out-of-town court reporter to testify in respect to an important deposition which had not been filed, in violation of the rules of court. Other less important conduct occurred in the course of the trial, which

alone might not warrant the granting of a new trial, but viewed cumulatively, in conjunction with the aforestated acts, are more than sufficient to make the court conclude that the plaintiff was not accorded a fair chance to present the facts of her case to the jury.

Plaintiff sued in a two-count complaint for damages from an assault in her room in defendant's motel. The first count was in tort and the second in contract. There is no question that the assault occurred and that very serious skull and other injuries were inflicted. The critical questions were: (1) Who inflicted the injuries, her husband or an intruder. (2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched door, or plaintiff's negligence due to introxication, or other circumstance. (3) Did the assault proximately result from defendant's negligence in failing to provide an adequate lock on the door or in not maintaining sufficient security guard in the corridor.

Very snide insinuations were made by defendant's counsel that plaintiff and her husband had had an altercation the previous evening. Counsel indicated he would prove it by the husband's statements to the switchboard operator when he repeatedly, vainly tried to reach his wife in their room in the early hours. Defendant's counsel similarly intimated by cross-examination, along the same line, which questioning would be followed by impeachment, but no impeachment on the subject ever occurred.

The court grants this motion for a new trial solely from its own observation of defense counsel's tactics, irrespective of the citation of similar action by the Illinois courts occasioned by the same counsel's counduct in the same regard (*Ryan* v. *Monson,* 33 Ill. App. 2d 406, 179 N. E. 2d 449 (1961); *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.,* 42 Ill. App. 2d 85, 191 N. E. 2d 410 (1963). The decisions do,

however, furnish corroboration that his acts were not mere happenstance, inadvertently and unintentionally occurring. In contrast, the court notes the strenuous and futile efforts of plaintiff's counsel to combat the insidious effect resulting from the artfully planted statements of defense counsel.

There is an extended discussion of the granting of motions for a new trial in *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3rd Cir. 1960). It is there said, at 90:

> "* * * New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, *prejudicial statements by counsel* * * *. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undersirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, * * * the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial." (Emphasis added.)

The rule of law is stated in 39 American Jurisprudence, New Trial § 53, thus:

> "Misconduct of counsel for one party, if of such a nature as to influence a verdict in favor of that party, or to prevent the adverse party from having a fair trial is * * * ground for a new trial. * * *
>
> "* * * In order to warrant the granting of a new trial, the objectionable conduct must appear to have been prejudicial to the interest of the complaining party. * * *"

Section 54, *ibid:*

> "Improper remarks and comments of counsel for a party, made in the presence and hearing of the jury, if of such character as to influence a verdict, prevent a fair trial * * * and * * * furnish good grounds for a new trial. * * *
>
> "As the right to a new trial may be founded upon counsel's misstatements of facts, or his statements of facts which have not been introduced in, or established by, evidence, frequently a new trial is sought and obtained upon the ground that counsel has made statements or arguments appealing to the emotions and prejudices of the jury."

Section 55, *ibid:*

> "The courts recognize the fact that proof frequently fails to come up to expectation, and the tendency is to permit counsel a reasonable latitude in stating to the jury the facts proposed to be shown, and when no substantial prejudice results * * * a new trial will not be required merely because of reference by counsel, in a civil case at least, in his opening statement to matters which he subsequently makes no attempt to prove. *The rule is different, however, where it is clear that prejudice resulted to the opposing side from the remarks of counsel in his opening statement, which was not cured by the action of the court.* * * *" (Emphasis added.)

Also in point are the numerous decisions and texts cited by plaintiff: Cleary, Handbook of Illinois Evidence § 9.11, p. 144; *Schoolfield* v. *Witkowski,* 54 Ill. App. 2d 111, 203 N. E. 2d 460 (1964); *Gordon* v. *Checker Taxi Co.,* 334 Ill. App. 313, 79 N. E. 2d 632 (1948); *Miller* v. *Chicago Transit Authority,* 3 Ill. App. 2d 223, 121 N. E. 2d 348 (1954); *Marut* v. *Costello,* 53 Ill. App. 2d 340, 202 N. E. 2d 853 (1964); 118 A. L. R. 543; *Duff* v. *Ewing,* 60 Ill. App. 2d 382, 208 N. E. 2d 320 (1965).

The court does not agree that there "was nothing in the

opening statement calculated to enflame the jury." Statements in respect to a husband-wife rift could have had great weight in the jury's decision as to whether the husband was the culprit in the assault.

The parts of the opening argument of counsel for the defense, which plaintiff cites as unsupported by subsequently presented evidence, are

> "The evidence will show that *the facts* concerning this unfortunate event *are within the knowledge of the plaintiff and her husband, and no one else* that we know of." (R. 5)
>
> * * * * *
>
> "The evidence will show that during that evening that the husband was making repeated telephone calls to this room, and that *the husband told the telephone operator that he and his wife had had a fight,* and that she wouldn't let him in the room." (R. 6)
>
> * * * * *
>
> "Now the room itself, when a person enters the room after you enter the door, to the right is the bathroom, and when the bathroom light is on and the door open, that *light is a strong light* and it shines in the face of anyone that comes in the door, so any person that was looking could see and *recognize such person.*
>
> "The evidence will show that outside the door, and immediately above where the two doors are there is another light, and it was a bright one, so that anyone opening the door, this light would shine on that person, so *even though a person were lying in bed they could see that person as to who that person was.*
>
> "I believe the evidence will show that the plaintiff stated after she had been in bed and had probably gone to sleep, that she looked up and she saw a man who she says was coming through the door, that she said 'Carl,' or something to that effect. She made no outcry whatsoever. * * *
>
> "* * * The evidence will show that she made no outcry." (R. 7-8) (Emphasis added.)

Plaintiff testified she did not recall a bright light shining outside the door, and that the hall seemed quite dark as she walked down it.

On cross-examination, plaintiff was asked if she had any differences of opinion with her husband and she answered no. When reminded that she left, "and alone," she replied she was tired and left to go to bed.

She stated again the light was dim by her door; that it was not real bright. The bathroom door was not wide open. The light from the corridor did not shine on the man. She called out her husband's name, "Carl." She was asked if she called "because you recognized the person you saw, did you not?" She answered, "I did not recognize him."

Mr. Kiefel when asked if he made a telephone call to his room from 2:00 a.m. to 7:00 a.m. said that he did not make one single telephone call. He was then asked: "Isn't it a fact that you began telephoning at 2:00 o'clock and continued telephoning until 7:00?" When an objection was sustained, counsel stated he was asking the question to lay the foundation for impeachment. Mr. Kiefel answered: "It is not." Then followed the question, "Did you, during that period, make between 12 and 14 telephone calls to your room?" The answer again was "I did not. * * * I didn't make any telephone calls during that period. Only at 6:30 when I went back to the room after playing blackjack when I telephoned my wife."

The court has reviewed the testimony of Sharon Hamlin, the nurse on duty in the hospital where plaintiff was taken after the occurrence. There are manifest inconsistencies between her statements, deposition, testimony and hospital records as to the state of consciousness of plaintiff at a time when plaintiff was questioned in the hospital. There are plain indications of the witness's hos-

tility to personal injury suits. She had signed her deposition, she states, which deposition she brought with her to Chicago and left it at defendant's counsel office, yet that deposition was never filed with the Clerk of the Court. Further, the indications are that counsel manipulated matters so that the court reporter who took the depositions or statements would not be available to appear at this trial to verify from her notes the actual interrogation and answers which took place. At plaintiff's counsel's request, she had agreed to appear here and had purchased her ticket, and at the last moment reneged on the ground that she could not be released from a deposition scheduled for the next day by an attorney who had on occasion represented the insurer of defendant, and in whose offices the critical deposition was taken. Plaintiff's counsel asked that attorney to reschedule the deposition but he refused. Defendant counsel's associate had retained that same Las Vegas attorney to represent defendant in another deposition taken in this cause. It is therefore evident that improper pressure could have been brought to bear to preclude the release of the court reporter from the scheduled deposition in order to prevent her appearance as a witness in the case.

As plaintiff points out, the Canons of Professional Ethics proscribe argument asserting as a fact something which had not been proved, or the introduction of statements into argument with intent to influence a jury (Canon No. 22).

The court is convinced that because of the unprofessional tatctics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and strata-

gem to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant.

The motion for new trial is granted.

2. OPINION OF THE COURT OF APPEALS, APPEARING AT 404 F. 2D 1163.

DONNA M. KIEFEL, *Plaintiff-Appellee,*

v.

LAS VEGAS HACIENDA, INC., a California corporation, *Defendant-Appellant,*

REESE HUBBARD, *Respondent-Appellant.*

DONNA M. KIEFEL, *Plaintiff-Appellee,*

v.

LAS VEGAS HACIENDA, INC., *Defendant-Appellant.*

Nos. 15933, 15976, 16210.

UNITED STATES COURT OF APPEALS
Seventh Circuit.

Nov. 15, 1968.

As Amended Dec. 31, 1968.
Rehearing Denied Jan. 6, 1969.

Before HASTINGS, FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.*

These cases come before this court on appeals from two separate trials in the district court and an appeal from an order assessing costs and attorneys' fees in the first of the two trials.

Plaintiff-appellee Kiefel and her husband* purchased a package air travel and hotel plan to Las Vegas in February, 1962. They were lodged in Room 315 of the Las Vegas Hacienda. On the evening and morning of February 28-March 1, 1962, plaintiff and her husband visited three night club shows and consumed several drinks. Returning to their hotel, another drink was had at the bar and plaintiff went off to their room to bed, while her husband remained in the casino stating he remained there until 6:30 a.m. Sometime before 5:20 a.m. someone entered Room 315 and attacked plaintiff, striking her on the head with a bottle of champagne, fracturing her skull and causing severe facial lacerations.

The complaint and amended complaint are founded in contract and tort for failure of defendant, Las Vegas Hacienda, to provide a reasonably safe sleeping room accommodation resulting in the personal injuries to plaintiff.

Case No. 15933

The first trial was heard by the Honorable Edwin A. Robson. After the jury returned a verdict for the defendant, plaintiff filed a motion for a new trial based on defense counsel respondent-appellant Reese Hubbard's alleged acts of misconduct. The court granted the motion and filed an opinion, *Kiefel* v. *Las Vegas Hacienda, Inc.*, 39 F. R. D. 592 (N. D. Ill. 1966). The question presented by this appeal is whether the acts of misconduct were such as to require a new trial.

Plaintiff-appellee cited in her brief on appeal no less than ten items of misconduct involving the first trial and the pretrial discovery as well as six additional items of misconduct at the second trial. With respect to the first trial, Judge Robson's opinion relied on two of the ten items of miscon-

* Divorced shortly after the first trial.

duct as individually requiring a new trial and further found that the remaining misconduct, when "viewed cumulatively, in conjunction with the aforestated acts, are more than sufficient to make the court conclude that the plaintiff was not accorded a fair chance to present the facts of her case to the jury." 39 F. R. D. at 593.

The first of the specific acts was the inclusion of statements in Hubbard's opening remarks to the jury which the court found to be capable of inflaming the jury, 39 F. R. D. at 595. The second of the acts was the failure to file a deposition in the case together with causing the reporter who took the deposition to be unavailable as a witness at the trial. 39 F. R. D. at 596.

The motion for a new trial asserted other misconduct including 1) making assertions of facts not proved, 2) attempting to improperly influence the jury by the introduction of statements into argument on matters not in evidence under the pretext of laying a foundation for impeachment which were never offered, 3) examining witnesses on an exhibit which was never offered in evidence, 4) repeatedly making known meritless objections both in the trial and pre-trial phases of the case for the purpose of harassment, 5) falsely stating to the court that he did not have a deposition which he apparently had under his control and probably was in his own office, and 6) objecting to the introduction of a deposition on the ground that he did not authorize it when it was taken under order of court entered after an agreement made by his co-counsel. In response to some of these acts, the court noted, 39 F. R. D. at 596:

> As plaintiff points out, the Canons of Professional Ethics proscribe argument asserting as a fact something which had not been proved, or the introduction of statements into argument with intent to influence a jury (Canon No. 22).

Whether on the basis of the two specific acts discussed by the court or the other acts viewed cumulatively, it is clear that Judge Robson was correct in granting the motion for a new trial. The legal authority set out in Judge Robson's opinion is sufficient to support his determination. 39 F. R. D. at 594-595. In addition to that authority, we rely on *Mangan* v. *Broderick & Bascom Rope Co.*, 351 F. 2d 24, 29, 31 (7th Cir. 1965), *Ryan* v. *Monson*, 33 Ill. App. 2d 406, 412-413, 415-517, 424 and 427-428 (1st Dist. 1961), and *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.*, 42 Ill. App. 2d 85, 191 N. E. 2d 410 (1963), all cases in which new trials were ordered due to improper trial tactics and unprofessional conduct on the part of the present respondent. We find that Judge Robson was correct in holding, 39 F. R. D. at 596:

> The court is convinced that because of the unprofessional tactics of Reese Hubbard, counsel for defendant, the plaintiff did not have a fair trial. Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply every sly trick and strategem to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant.
>
> The motion for new trial is granted.

Accordingly, we affirm the decision of the district court granting plaintiff-appellee's motion for a new trial.

Affirmed.

Case No. 15976

After the conclusion of the trial before Judge Robson, the plaintiff filed a motion to assess costs and attonreys' fees against defendant Las Vegas Hacienda, Inc., and Reese Hubbard jointly and severally. The court entered a judgment order against defendant and counsel in the sum of Eight Thousand One Hundred Seventy-One Dollars and Fifty-Six Cents ($8,171.56) consisting of Six Thousand One Hundred Dollars ($6,100.00) in attorneys' fees and Two Thousand Seventy-One Dollars and Fifty-Six Cents ($2,071.56) as costs, and itemized as follows:

Attorneys' fees:

(a) James A. Brandvik, the sum of— for the trial of this cause;	$2,000.00
(b) Lowell H. Jacobson, the sum of— for the trial of this cause;	3,000.00
(c) James A. Brandvik and Lowell H. Jacobson, for services in connection with the post-trial motion—	1,000.00
(d) James A. Brandvik, attorney's fees in connection with the Las Vegas deposition of Sharon Hamlin—	100.00
Total Attorneys' Fees.....	$6,100.00

Costs:

(a) Claude Youker, reporter's bills—		$ 947.15
(b) Graham & Associates, for service of summons on expert witnesses, mileage and advancement of witness fees—		101.80
(c) Court Reporter Stella Butterfield for copy of Sharon Hamlin deposition not previously filed—		17.25
(d) Expert witness fees for plaintiff's experts as follows:		
1. Dr. Textor	$ 75.00	
2. Dr. Halstead	$250.00	
3. Dr. Cutler	150.00	
4. Locksmith James Busch	200.00	675.00
(e) Air Fare to Las Vegas and return regarding deposition of Sharon Hamlin—		230.36
(f) Meals and lodging incurred by Attorney James A. Brandvik in connection with deposition—		100.00
Total Costs.....		$2,071.56

From this order defendant-appellant and respondent-appellant appeal.

The authority for assessment of costs is set forth in 28 U. S. C. §§ 1920, 1921, 1923 and 1927. The specific items taxable as costs are limited by the express language of the statute. *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227, 85 S. Ct. 411, 13 L. Ed. 2d 248 (1964); *Braun* v. *Hassenstein Steel Co.*, 23 F. R. D. 163 (D. S. D. 1959) and Federal Rules of Civil Procedure, Rule 54(d). 28 U. S. C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

This section of 28 U. S. C. relieves Las Vegas Hacienda of any responsibility for costs assessed by the trial court, and any costs assessed are taxable to Reese Hubbard personally.

While it is relatively unusual for a decision to be reversed due to prejudice injected into the trial by an attorney, or to require a new trial therefor, it is uncommon to assess costs on the attorney involved. This is a power which the courts should exercise only in instances of a serious and studied disregard for the orderly processes of justice. In the language of the statute, it is a power which is exercisable only where the effect of the attorney's conduct is such as "unreasonably and vexatiously" increases the costs. The attorney's conduct, described previously, is clearly within these restrictive standards. His acts of misconduct were correctly found to be intentional, involving serious breaches of the Canons of Ethics. In view of Judge Robson's finding of Hubbard's "long and extensive trial experience," we also deem it appropriate to consider Hubbard's conduct in past cases.

Counsel Reese Hubbard's history of past misconduct is well documented in the prior opinions of this court. The first occasion we had to consider his conduct was in *O'Shae* v. *Jewel Tea Co.*, 233 F. 2d 530 (7th Cir. 1956). In the trial of that case, Reese Hubbard offered to produce a witness for the defense who could testify as to whether another witness was not blind; a fact which, if shown, would have permitted a defense exhibit to be introduced into evidence. The witness was not produced and, on appeal, the defense

urged that the failure to admit the exhibit was error. In discussing that issue, the court held, 233 F. 2d at 533:

> "If counsel for the defendant had witnesses to prove such facts he should have, in fairness to the trial court, introduced their testimony as part of his defense.

The court then also observed that certain statements of the trial judge to which exception was taken on appeal by defendant were, in part, "entirely justified by the actions of defense counsel * * *." 233 F. 2d at 535.

In *Quality Molding Co.* v. *American Nat'l Fire Ins. Co.*, 287 F. 2d 313 (7th Cir. 1961), Reese Hubbard on behalf of the plaintiff, seriously misquoted an important precedent both in the trial court and in the brief filed in this court. After showing the nature of the misquote, the court held, 287 F. 2d at 316:

> We would much prefer to think the omission of the all important words was inadvertent. However, counsel for defendants states the same omissions was made in the District Court, and the misquotation was specifically called to the attention of plaintiff's counsel in the trial brief which was filed by defendants.
>
> A sloppy mistake in a quotation might be at least understandable on the part of a careless attorney. But, a deliberate misquotation calls for a strong condemnation. However, we do not initiate disciplinary action in this Court because there is a bare possibility that the fact that counsel's quotation was not correct might not have come to the personal attention of the attorney preparing the brief in this Court.
>
> Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinions of other courts as well as other statements therein are completely accurate.

Because of the serious consequences which may result from that type of misconduct, this court was most reluctant to find that the misquote was intentional.

However, the circumstances surrouding the misconduct ni *Mangan* v. *Broderick & Bascom Rope Co.*, 351 F. 2d 24 (7th Cir. 1965), left no doubt that this later misconduct was intentional. After objections were sustained to questions offered by Reese Hubbard and his offer of proof for the defense was denied, he persisted in asking a question which improperly injected the issues of workmen's compensation and insurance into the trial. This court described the circumstances and held that the misconduct would justify a new trial for the plaintiff, 351 F. 2d at 29:

> * * * Subsequently, in his examination of one of the treating phyicians, counsel asked the physician who had paid plaintiff's bill and elicited the answer that the insurance company had done so. The question and answer were stricken. Though the court chastised counsel for his *deliberate disobedience to the court's prior admonition,* plaintiff's motion for a mistrial was denied.
>
> * * * * *
>
> In this case, the conduct of defendant's counsel in his cross-examination of Schweitzer's office manager, the doctor and Borchardt *in defiance of the court's admonition* was an act not to be condoned. The motive for such questioning could not have been entirely an attempt to show possible bias of the witnesses. The doctor was not a Schweizter employee. He could have no possible interest in the case. Borchardt was not a Schweitzer employee as we shall presently show. Thus, even if the judge was correct in his ultimate ruling that evidence of the receipt of workmen's compensation might be adduced to show the possible bias of witnesses, we are still faced here with gross error. *Counsel's willingness to inject that evidence into the case at any cost is sufficient to earn him a new trial for plaintiff.* [Emphasis added.]

This court also warned that other intentional misconduct on his part should not be repeated, 351 F. 2d at 31:

> Finally, the conduct of defendant's counsel in cross-examining a witness upon an exhibit which was not in evidence and which was never offered in evidence was such a *deliberate misuse of the judicial process* that it must not be repeated upon a retrial of this suit. (Emphasis added.]

In *Neusus* v. *Sponholtz,* 369 F. 2d 259 (7th Cir. 1966), Reese Hubbard again engaged in prejudicial cross-examination. The court called attention to the misconduct, 369 F. 2d at 260-261, fn. 2:

> Although we do not reach these questions, the objectionable trial tactics of defense counsel for American, Reese Hubbard, should not escape comment. His conduct was very unprofessional in several instances, particularly with respect to his method of cross-examination by unsupported innuendo, and were it not for our resolution of the principle issue a new trial would have to be granted to the plaintiff. * * *
>
> * * * * *
>
> *The cross-examination tactic of attorney Hubbard is particularly objectionable in this case because it appears to have been undertaken deliberately and with complete disregard of the consequences.* The same counsel has been criticized on a number of occasions for the same tactic and other tactics which are questionable from the standpoint of professional ethics. * * * [Emphasis added.]

The court then cited its earlier opinions on point and the decision of Judge Robson in the first trial of the case now before us.

Respondent Hubbard's unprofessional conduct has also been criticized by the Illinois Supreme and Appellate Courts in opinions entered after our criticism in *Quality Molding.* In *Ryan* v. *Monson,* 33 Ill. App. 2d 406, 179 N. E. 2d 449 (1st Dist. 1961), the court reversed a judgment for the defendant in a personal injury action because Hubbard's

various acts of misconduct formed a pattern which permeated the trial and tainted the judgment. Specifically, he harassed opposing counsel during pre-trial discovery; engaged in improper cross-examinations; made erroneous statements of fact to the trial court and of law to the jury; examined a witness on exhibits not in evidence which he did not show to opposing counsel; and made inflammatory statements in closing argument. Id. at 412-413, 415-417, 424 and 427, 179 N. E. 2d 449. The opinion also ordered that the case be remanded for a hearing on a motion to assess expenses and attorney's fees due to the misconduct. Id. at 427-428, 179 N. E. 2d 449. In *Cline* v. *Kirchwehm Bros. Cartage Co., Inc.*, 42 Ill. App. 2d 85, 191 N. E. 3d 410 (1963) a new trial on the issue of damages was ordered because of Hubbard's misconduct including, once again, improper cross-examination and repeated disregard for rulings of the trial judge. Most recently, in *People ex rel. General Motors Corp.* v. *Bua,* 37 Ill. 2d 180, 226 N. E. 2d 6 (1967), Respondent Hubbard was found to have "sought to obstruct the orderly processes of discovery" by harassing opposing counsel contrary to "the spirit of the rules." Id. at 192 and 195, 226 N. E. 2d at 14.

It is important to note that these past acts of misconduct are of the same nature as those engaged in during and preceding the first trial of this case. This is especially so in regard to four types of misconduct: 1) making misstatements of fact and law to the juries and the courts, 2) using harassing and obstructionist tactics in pre-trial discovery, 3) injecting inflammatory statements into argument which were calculated to prejudice the juries, and 4) conducting improper cross-examination on matters not in evidence or on issues to which the court had already sustained objection.

Not satisfied with the lesson he should have learned from

the outcome of the first trial and the judgment of costs against him, Hubbard continued his misconduct at the second trial. During the argument on the defendant's motion for a new trial at the end of the second trial, Judge Decker expressed his strong disapproval with the misconduct at the second trial. Judge Decker reprimanded Hubbard for seeking numerous postponements of the second trial and then appearing on the date specifically set asking for a stay due to the appeal in this case which Hubbard had been preparing all along but of which he had never notified the trial court. Hubbard, while reading a deposition aloud changed an answer from "incorrect" to "correct," thus reversing its meaning. He also stated that thousands of motels were equipped with the type of door lock involved in the case when, in fact, there were not thousands of motels but thousands of locks in a small number of motels. But these were not the gravest acts of misconduct.

At one point, Hubbard stated that Mrs. Kiefel had been asked a question and had answered and represented this as part of her testimony at the first trial. In fact, the question and answer had been stricken at Hubbard's own objection. Judge Decker gave him an opportunity to correct his statement to the jury. When Hubbard did not choose to do so, Judge Decker commented, Appendix vol. II at 761:

> The Court: All right. Well, I don't know what a court—what a Court of Appeals would say as to the propriety of trial tactics should [sic] as you engaged in telling the jury that this was her testimony at the last trial when the record shows that the question and the answer were both stricken. Now, perhaps that will someday be called to the Court's attention.

At the hearing on the defendant's motion for a new trial, Hubbard accused the court of prejudicing the jury by rais-

ing his voice. Judge Decker could only recall one instance where he raised his voice and that occurred when Hubbard tried to surreptitiously slip an exhibit into the jury room which had been denied admission more than once. He said, Additional Appendix at 205-06:

> I will plead guilty to at least one occasion when I raised my voice above its normal level. It occurred, however, at the conclusion of the case and out of the presence of the jury when the defendant's counsel presented me with a number of defendant's exhibits which he asked me to have taken to the jury room. It was discovered that included among these exhibits was one particular selected portion of a medical record to which objection had been repeatedly sustained during the trial, not once, but a number of times. *In my opinion, the insertion of this exhibit which had not been admitted in evidence was not inadvertent.* I can say that a trial judge's patience is not inexhaustible. I did raise my voice. [Emphasis added.]

Just as "No man is an island unto himself" but each has effect on the whole, no attorney stands by himself. Each attorney's acts reflect on the entire profession. Respect for one encourages respect for all while the misconduct of one impairs the integrity of all. The unprofessional conduct in these two trials and in the history of Hubbard's practice as shown by prior appellate opinions in outrageous in nature. In *Quality Molding,* we declined to assume that his misquotation before this court was intentional. We can no longer indulge in an assumption of inadvertence, especially as to the misconduct shown in this case. Nor is there any doubt that Hubbard could be unaware that his conduct could lead to an assessment of costs against him in view of the fact that in *Ryan* v. *Monson,* a remand was had for that very purpose.

While the assessment of costs is provided for by the statute, attorneys' fees are not ordinarily assessed on a

party. As stated in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714 at 717, 87 S. Ct. 1404 at 1407, 18 L. Ed. 2d 475 (1967):

> The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This Court first announced that rule in *Arcambel* v. *Wiseman*, 3 Dall. 306, 1 L. Ed. 613 (1796).

Attorney's travel expenses for taking of depositions are not taxable. *Michigan Aluminum Foundry Co.* v. *Aluminum Co. of America*, 190 F. 903 (CCA 1911) and *Hope Basket Co.* v. *Product Advancement Co.*, 104 F. Supp. 444 (W. D. Mich. 1952).

From and under the application of the various sections of 28 U. S. C. the court finds and concludes:

That the sum of Six Thousand One Hundred Dollars ($6,100.00) comprising attorneys' fees:

(a) James A. Brandvik, the sum of— for the trial of this cause;	$2,000.00
(b) Lowell H. Jacobson, the sum of— for the trial of this cause;	3,000.00
(c) James A. Brandvik and Lowell H. Jacobson, for services in connection with the post-trial motion—	1,000.00
(d) James A. Brandvik, attorney's fees in connection with the Las Vegas deposition of Sharon Hamlin—	100.00
Total Attorney's Fees.....	$6,100.00

are eliminated from the judgment hereinbefore entered.

The court has further considered the costs:

(e) Air fare to Las Vegas and return regarding deposition of Sharon Hamlin—	$ 230.36
(f) Meals and lodging incurred by Attorney James A. Brandvik in connection with deposition—	100.00

and eliminates these items in the sum of Three Hundred Thirty Dollars and Thirty-six Cents ($330.36).

The Court sustains the costs:

(a) Claude Youker, reporter's bills—		$ 947.15
(b) Graham & Associates, for service of summons on expert witnesses, mileage and advancement of witness fees—		101.80
(c) Court Reporter Stella Buterfield for copy of Sharon Hamlin deposition not previously filed—		17.25
(d) Expert witness fees for plaintiff's experts as follows:		
1. Dr. Textor	$ 75.00	
2. Dr. Halstead	250.00	
3. Dr. Cutler	150.00	
4. Locksmith James Busch	200.00	675.00

in the total sum of Seventeen Hundred Forty-one Dollars and Twenty Cents ($1,741.20) against Reese Hubbard personally.

The Court further finds under 28 U. S. C. § 1927 that because of the additional proceedings caused by the conduct of Reese Hubbard, this matter is remanded to the trial judge for assessment of costs against Reese Hubbard for the expenses of printing plaintiff-appellee's 54 page brief and the additional appendix in No. 15976 and a sum no greater than one-third (⅓) the plaintiff-appellee's attorney's fee incurred in the appeal of cases Nos. 15933, 15976 and 16210.

It is hereby ordered that the district court give and enter judgment in favor of plaintiff, Donna M. Kiefel for the use and benefit of his attorneys, James A. Brandvik and Lowell H. Jacobson, and against Reese Hubbard individually in the amount of Seventeen Hundred Forty-one Dollars and Twenty Cents ($1,741.20) and the additional amounts consisting of no more than one-third plaintiff-appellee's attorneys' fee incurred as a result of the appeal of cases Nos. 15933, 15976 and 16210, and the total cost of printing

plaintiff-appellee's 54 page brief and the additional appendix in No. 15976 as reimbursement for costs by plaintiff-appellee's attorneys for and on behalf of plaintiff-appellee.

Affirmed in part, reversed in part, remanded with directions.

Case No. 16210.

The second trial was had before the Honorable Bernard M. Decker. At the conclusion of the trial, the jury reached a verdict in favor of plaintiff-appellee Donna Kiefel in the amount of One Hundred Thousand Dollars ($100,000.00) against defendant-appellant Las Vegas Hacienda, Inc. (hereinafter called Hacienda). Judgment was entered on the verdict against Hacienda and an order was entered on March 15, 1967, increasing the costs taxed by the clerk by an additional One Hundred Sixteen Dollars and Ten Cents ($116.10). From this judgment and order, Hacienda appeals.

The primary issue raised by this appeal is whether the facts were sufficient in law to support the jury's verdict. The three particular questions asked by Hacienda are:

1. Was the lock actually forced open on the night of the occurrence?
2. Was the assailant an unknown intruder or might it have been Carl Kiefel, plaintiff's husband?
3. Did Donna Kiefel lock the door before going to bed, or did she leave it open for her husband?

The testimony in the record indicates the lock used on the door to Room 315 was a Schlage lock, model A 51-PD. The projection of the bolt in the lock taken from the door is $\frac{3}{4}$ of an inch. Witness James Busch, a master locksmith, testified the lock was defective, since there was $\frac{1}{4}$ of an inch of play or 33⅓% of the total length of the bolt. Additionally, there was testimony that the door was loose fitting

and the cutting of the door for the installation of the lock was larger than necessary, allowing additional play of another $\frac{1}{8}$ of an inch, leaving only $\frac{1}{8}$ of an inch security in the lock. Daniel G. Olson, Schlage Lock Company representative, testified there was evidence of a "gouge" on the lock resulting in damage. The local police department was on the scene and in the course of the investigation noted there were fresh paint chips from the door and molding at the base of the lock and chips on the floor at the door entry to the room "that appeared to be of the same type of paint that was present on the door and door jamb and appeared to be relatively fresh." The police report recorded that "upon closer examination noted the door had recently been shimmed."

Additionally, on the night of the incident, travellers checks were reported stolen from Donna Kiefel's purse which was in the room when the assault occurred. These checks were located by the police the following day and were determined to have been forged and cashed at a hotel several blocks from the Hacienda by an unknown person.

All of this information was before the jury through exhibits, depositions, and examination and cross-examination of the witnesses. There was adequate latitude allowed by the trial court for the defense to raise the questions of fact now placed before this court as well as the tactical interplay by defense counsel. The jury found the factual questions in favor of the plaintiff and there are adequate grounds for its so finding.

Hacienda also contends that the trial judge erred in refusing to admit its Exhibit No. 7 into evidence. Exhibit No. 7 consisted of one page of the nurses' notes which were notes made by the nurses attending Donna Kiefel during her hospitalization. The pertinent portion of Exhibit No. 7 are notes made by Nurse Sharon Hamlin of a statement

made by Donna Kiefel at approximately 3:00 a.m. on March 4, 1962. The notes indicate that Donna Kiefel said she left "the door unlocked so that her husband could come in—."

We find no reversible error in excluding Exhibit No. 7. This exhibit was one page copied from Exhibit No. 10-A which consisted of all the pertinent hospital reports. Exhibit No. 10-A was admitted into evidence and Nurse Hamlin was examined on it at length. Thus, there was no omission of this important evidence as it was presented to the jury and presumably weighed in arriving at its verdict.

We perceive no error in the other objections raised by Hacienda.

The judgment on the verdict and the order taxing costs are hereby affirmed.

Affirmed.

3. THE JUDGMENT OF THE COURT OF APPEALS ON THE FIRST APPEAL.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

Friday November 15, 1968.

Before
Hon. John S. Hastings, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Otto Kerner, Circuit Judge

DONNA M. KIEFEL,
Plaintiff-Appellee,
No. 15933 and 15976 (Consolidated)
vs.
LAS VEGAS HACIENDA, INC., a California corporation,
Defendant-Appellant,
REESE HUBBARD,
Respondent-Appellant.

DONNA M. KIEFEL,
Plaintiff-Appellee,
vs.
No. 16210
LAS VEGAS HACIENDA, INC.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decisions, judgments and orders in this cause appealed from be, and the same are hereby AFFIRMED in part, REVERSED in part and REMANDED to the said District Court with directions, in accordance with the opinion of this Court filed this day.

4. OPINION OF THE COURT OF APPEALS ON THE SECOND APPEAL.

(Per Dec. 28, 1970.)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago, Illinois 60604.

Wednesday, December 23, 1970.

Before
Hon. F. Ryan Duffy, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Otto Kerner, Circuit Judge

DONNA M. KIEFEL,
Plaintiff-Appellee,
vs.
No. 18157
(Consolidated with Nos. 15933, 15976, 16210)
LAS VEGAS HACIENDA, INC., a California corporation,
Defendant-Appellant,
and
REESE HUBBARD,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER.

Respondent-appellant, Reese Hubbard, was counsel for Las Vegas Hacienda, Inc., a defendant in a negligence action instituted in the district court by Donna Kiefel, plaintiff-appellee herein. Various instances of misconduct by Hubbard in conducting the defense at trial resulted in

the district court ordering a new trial after a verdict for the defendant. On retrial, a verdict was rendered in favor of Kiefel and the court ordered Hubbard and Las Vegas Hacienda, Inc., to pay plaintiff Kiefel's attorneys' fees and costs at trial.

On appeal, this court held that Hubbard was not responsible to pay for attorneys' fees at trial and deposition costs of the plaintiff. *Kiefel* v. *Las Vegas Hacienda, Inc.*, 404 F. 2d 1163, 1170 (7th Cir. 1968). The court also remanded for hearing to assess costs against Reese Hubbard for the expenses of printing plaintiff [Kiefel's] . . . brief and the additional appendix . . . and a sum no greater than one-third (⅓) the plaintiff [Kiefel's] . . . attorneys' fee . . ." for the appeal, "because of the additional proceedings caused by the conduct of Reese Hubbard. . . ." 404 F. 2d at 1171.

The Supreme Court of the United States denied Hubbard's petition for writ of certiorari, in which it was argued, *inter alia*, that this court's assessment for attorneys' fees and the printing of the briefs and appendix was in error. At the hearing on remand, the district judge determined that $15,000 was a "fair and reasonable" sum for the plaintiff's attorneys' fees on appeal; Hubbard was assessed $4,000 which represented a sum no greater than one-third of that figure. From this finding, Hubbard appeals.

Hubbard once again attacks the validity of our assessment of attorneys' fees on appeal, as he also did before the Supreme Court in his petition for certiorari. We need not reconsider that issue since it is the law of this case. Nonetheless, we re-affirm the assessment we made in our prior opinion.

Both 28 U. S. C. § 1912 and § 1927 empower us to make such awards when an appeal is frivolous, creates delay

or when the conduct of an attorney is deemed reprehensible. Federal courts of appeal have wide latitude to assess the costs for appeal. See *Jones* v. *Schellenberger,* 225 F. 2d 784 (7th Cir. 1965); see also *Oscar Gruss & Son Lumbermens Mutual Casualty Co.,* 422 F. 2d 1278, 1284 (3d Cir. 1970); *Lowe* v. *Willacy,* 239 F. 2d 179 (9th Cir. 1956); *In re Midland United Co.,* 141 F. 2d 692 (3d Cir. 1944). Further, equitable authority as well as statutory authority can be the basis for such an award. As stated in *Local No. 49 United Auto Workers* v. *American Brake Shoe Co.,* 298 F. 2d 212 (4th Cir. 1962) at 214:

> The principle that the Federal Courts have inherent power to award attorneys' fees as costs in the absence of statutory authority has been recognized where such fees have been denied, relied on where they were granted. The variety of factual circumstances in which this principle has been applied indicates that "dominating reasons of justice" has been the guide to its application.

The case relied on by Hubbard, *Fleischmann Corp.* v. *Maier Brewing,* 386 U. S. 714 (1967), itself recognized that attorneys' fees could be awarded in exceptional circumstances and in the interests of justice.

The facts discussed in our prior opinion amply demonstrate that Hubbard's conduct was, as found, "outrageous in nature." 404 F. 2d at 1170. Because of his questionable tactics, a verdict was overturned, and the case was retried. The appeal from these two trials and the assessment of trial costs and attorneys' fees could have been simplified or perhaps avoided but for the behavior of Hubbard.

The remaining issue before us is the reasonableness of the $4,000 assessment against Hubbard by the district judge on remand. The attorneys for the plaintiff submitted a work sheet which contained the time spent on the appeal and their charges for that time. The figure amounted to

$30,400, but was reduced by the judge to $15,000. The assessment to Hubbard of $4,000 was less than one-third of the amount determined by the judge, and was a reasonble award.

Moreover, the total fees awarded to the plaintiff's attorneys, including that assessed to Hubbard, which amounted to nearly 40% of the judgment received by the plaintiff, did not violate the rules with respect to contingency fees in the Canon of Ethics. The Manual on Fees and Charges, applicable to Illinois lawyers, allows contingency fees as high as 50% of the judgment in some cases. Besides this, Hubbard, as a judgment debtor, is not in a position to complain that the total amount received by the plaintiff's attorneys was excessive or unethical. *Hall* v. *Metropolitan Life Insurance Co.*, 298 Ill. App. 83, 88 (1938).

Accordingly, it is ordered that the assessment made by the district court be affirmed.

AFFIRMED.

APPENDIX C.

JUDGMENTS APPEALED FROM.

1. Judgment entered October 24, 1966, by Judge Robson.

JUDGMENT ORDER.

(Entered October 24, 1966.)

This cause coming on to be heard on the motion of plaintiff, Donna M. Kiefel, to assess costs and attorneys' fees against the defendant, Las Vegas Hacienda, Inc., and/or defendant's attorney Reese Hubbard; the Court previously having granted plaintiff's motion for new trial on February 28, 1966 (39 Federal Rules Decisions 592), and the Court previously having ruled on October 3, 1966, with reference to the jurisdiction of the Court to hear this matter and assess attorneys' fees and costs at this time and as to defendant's demand for trial by jury on the motion to assess costs and attorneys' fees; and counsel for all parties being present in Court, and the Court hearing testimony of Attorneys James A. Brandvik and Lowell H. Jacobson and receiving in evidence plaintiff's Exhibit 1 (summary of costs expended by plaintiff's counsel), plaintiff's Group Exhibit 2 (copies of bills and receipts for costs), and plaintiff's Exhibit 3 (Illinois State Bar Association Schedule of Minimum Fees); and the Court being duly advised in the premises;

The Court finds that plaintiff's attorneys, Lowell H. Jacobson and James A. Brandvik, are entitled to attorneys' fees in their favor payable by Reese Hubbard and defendant, Las Vegas Hacienda, Inc., a California corporation, as follows:

(a) James A. Brandvik, the sum of— for the trial of this cause;		$2,000.00
(b) Lowell H. Jacobson, the sum of— for the trial of this cause;		3,000.00
(c) James A. Brandvik and Lowell H. Jacobson, for services in connection with the post-trial motion—		1,000.00
(d) James A. Brandvik, attorney's fees in connection with the Las Vegas deposition of Sharon Hamlin—		100.00
Total Attorneys' Fees.....		$6,100.00

The Court further finds that plaintiff's counsel, Lowell H. Jacobson and James A. Brandvik, on behalf of plaintiff, expended and incurred the following costs in connection with the matters in issue and are entitled to reimbursement from Reese Hubbard and defendant, Las Vegas Hacienda, Inc., a California corporation, for said costs as follows:

(a) Claude Youker, reporter's bills—		$ 947.15
(b) Graham & Associates, for service of summons on expert witnesses, mileage and advancement of witness fees—		101.80
(c) Court Reporter Stella Butterfield for copy of Sharon Hamlin deposition not previously filed—		17.25
(d) Expert witness fees for plaintiff's experts as follows:		
1. Dr. Textor	$ 75.00	
2. Dr. Halstead	250.00	
3. Dr. Cutler	150.00	
4. Locksmith James Bush	200.00	675.00
(e) Air fare to Las Vegas and return regarding deposition of Sharon Hamlin		230.36
(f) Meals and lodging incurred by Attorney James A. Brandvik in connection with deposition—		100.00
Total Costs		$2,071.56

It Is Hereby Ordered that judgment be given and is hereby entered in favor of plaintiff, Donna M. Kiefel, for the use and benefit of her attorneys, James A. Brandvik and Lowell H. Jacobson, and against Reese Hubbard and defendant, Las Vegas Hacienda, Inc., a California corporation, jointly and severally, in the amount of Eight Thousand One Hundred Seventy-one Dollars and Fifty-six Cents ($8,171.56) consisting of Six Thousand one Hundred Dollars ($6,100.00) in attorneys' fees and Two Thousand Seventy-one Dollars and Fifty-six Cents ($2,071.56) as reimbursement for costs incurred by plaintiff's attorneys for and on behalf of plaintiff.

It Is Further Ordered that this is a final decision on the motion for costs and attorneys' fees and that no just reason exists to delay enforcement or appeal of this judgment order; the Court makes express determination that there is no just reason for delay; the Court directs entry of final judgment.

2. Excerpts from mandate of Court of Appeals, dated June 11, 1969:

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

Taxed in favor of: Donna M. Kiefel

BILL OF COSTS.

In Cause No. 15976 { Donna M. Kiefel, Plaintiff-Appellee
Reese Hubbard, Respondent-Appellant

* * * * *

5. Charge for copy of an opinion of the court $1.25. Additional Appendix to brief for Plaintiff-Appellee In # 15933, 15976, 16210 and brief for plaintiff-appellee (Award of Attorneys fees and costs) $1387.80.

6. Cost of printing $473.00. Total $1860.80.

* * * * *

and further that Donna M. Kiefel, Plaintiff-Appellee for the use and benefit of her attorneys, James A. Brandvik and Lowell H. Jacobson recover against Reese Hubbard, Respondent-Appellant the sum of One Thousand Eight Hundred Sixty Dollars and 00/100 Dollars ($1,860.80) for their cost herein expended with direction to award execution thereof.

3. Judgment entered Sept. 22, 1968 by Judge Decker.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—63-C-1982) * *

JUDGMENT ORDER.

This cause coming on to be heard on the motion of the plaintiff, Donna M. Kiefel, to assess attorneys' fees against the respondent, Reese Hubbard, pursuant to the mandate issued by the U. S. Court of Appeals for the Seventh Circuit in cause No. 15976; and counsel for all parties being present in court, and the Court having examined the exhibits and all the pleadings filed in connection with said motion:

It Is Hereby Ordered that judgment be given and is hereby entered in favor of the plaintiff, Donna M. Kiefel, for the use and benefit of her attorneys, Lowell H. Jacobson and James A. Brandvik, and against Reese Hubbard, respondent, in the amount of Four Thousand Dollars ($4,000.00), as and for one-third (⅓) of the appeal attorneys' fees pursuant to the direction in the mandate in cause No. 15976.

Dated: Enter:

/s/ Bernard M. Decker,
Judge.

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division.

Name of Presiding Judge, Honorable Bernard M. Decker.

Cause No. 63 C 1982 Date 9/22/69

Title of Cause Donna M. Kiefel v. Las Vegas Hacienda, Inc. and Reese Hubbard, Respondent.

Brief Statement of Motion

Motion for approval of proposed findings of fact and entry of judgment for attorneys' fees.

Names and Addresses of moving counsel

Lowell H. Jacobson and James A. Brandvik
70 South La Salle Street
Chicago, Illinois 60603

Representing

Plaintiff

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Peter Fitzpatrick, Attorney for Respondent,
Reese Hubbard
10 South La Salle Street
Chicago, Illinois 60603
Respondent, Reese Hubbard

Enter Findings of Fact and Conclusions of Law.

(Draft)

Enter Judgment for costs in amt. of $1741.20 without interest. Judgment satisfied in open Court.

Enter Judgment Order in favor Plff. and against Reese Hubbard, respondent in amt. of $4,000.00 as & for ⅓ appeal Atty. fees.

(Draft)

Sep. 23, 1969 Decker, J

APPENDIX D.

EXCERPTS FROM ANSWER AND JURY DEMAND OF DEFENDANT AND REESE HUBBARD, FILED SEPT. 16, 1966.

Exhibit A.

State of Illinois, } ss.
County of Cook. }

I, Richard B. Austin, being first duly sworn, says that during the eight years I presided as a Judge of the Superior Court of Cook County and the five years I presided as a Judge of the United States District Court for the Northern District of Illinois, Attorney Reese Hubbard has appeared before me on five occasions in contested jury trial. Three of these cases were tried before me as a Judge of the United States District Court, all of which went to verdict, and each of which took a minimum of two weeks to try.

I found Mr. Hubbard to be a capable, vigorous and ingenious lawyer, ardently devoted to the interests of his clients. He has in all instances respected the rulings of the court and before me was not guilty of any professional misconduct in either the examination or cross examination of witnesses, in argument to either the court or jury, or in his presentation of the law in support of his position in regard to any legal questions that arose during the course of the trials.

Richard B. Austin.

Subscribed and sworn to before me this 15th day of September, 1966.

Vonnie Donnelly,
Notary Public.

(Seal)

Exhibit B.

Affidavit.

State of Illinois, } ss.
County of Cook. }

I, Wilbert F. Crowley, being first duly sworn, say: before the Illinois judicial amendment became effective, I was a judge of the Superior Court of Cook County, Illinois. Since that time I have been and am now a judge of the Circuit Court of Cook County.

Reese Hubbard had been trying cases before me for fifteen years. He has appeared in not less than fifty cases that have been in my court for trial. More than twelve of the cases were tried to a verdict. More than six of the trials have lasted two weeks or more. In all of the cases over the years that Reese Hubbard has had before me, he has always conducted himself properly and his cross examination of the witnesses have always been thorough, but in no instance was his cross examination unfair or improper.

Further affiant sayeth not.

Wilbert F. Crowley.

Subscribed and sworn to before me this 23rd day of August, 1966.

Georgette Buckley,
Notary Public.

(Seal)

Exhibit C.

State of Illinois, } ss.
County of Cook. }

I, Walter J. LaBuy, being first duly sworn say:

I am a judge of the United States District Court, Northern District of Illinois, Eastern Division. During the past twelve years Reese Hubbard has been trying cases before me. He has had more than thirty-five jury cases in my court. Eight or more went to verdict. He has always conducted himself properly and in a lawyer-like manner in my court. His cross-examination has been thorough but never unfair or improper.

Further affiant saith not.

Walter J. LaBuy.

Subscribed and sworn to before me this 23rd day of August, 1966.

Connie M. Schneidt,
Notary Public.

(Seal)

Exhibit D.

State of Illinois, } ss.
County of Cook. }

I, John E. Pavlik, being first duly sworn depose and say:

I am now associate judge of the Probate Court of Cook County. Prior to the adoption of the Illinois Judicial Amendment I was a judge of the City Court of Calumet City. I have also been sitting as a visiting judge in the Circuit Court and in the Superior Court of Cook County.

I do further say that upwards of twenty-five jury cases were assigned to me for trial, in each of which Reese Hubbard was attorney for one of the parties. I do further say that as many as fourteen of said cases went to a verdict. Several of the cases were of two weeks or more duration. I do further say that upon the trial of said cases the said Reese Hubbard followed my rulings. He did nothing which was subject to criticism.

Further affiant sayeth not.

John E. Pavlik.

Subscribed and sworn to before me this 23rd day of August, 1966.

(Seal)

John E. Sacaraffa,
Deputy Clerk of the Circuit Court of Cook County.

Exhibit E.

State of Illinois, } ss.
County of Cook. }

I, Harry G. Hershenson, being first duly sworn, depose and say:

I am a judge of the Circuit Court of Cook County. During the last seven or eight years Reese Hubbard has been trying cases before me. He has appeared as one of the attorneys upon eight or more cases that have been assigned to me for trial. Five of said cases were tried all the way through to a jury verdict. Each of two of said cases took two weeks to try. I do further say that the conduct of Reese Hubbard in the trial of the cases before me has been proper and is not subject to criticism. He did not indulge in any misconduct at any time.

Further affiant sayeth not.

Harry G. Hershenson.

Subscribed and sworn to before me this 23rd day of August, 1966.

Betty Geisler,
Deputy Clerk of the Circuit Court of Cook County.

Exhibit F.

State of Illinois, }
County of Cook. } ss.

I, Elmer N. Holmgren, being first duly sworn say:

For the twelve years next preceding the adoption of the Judicial Amendment of Illinois, I sat as a judge in the Superior Court of Cook County and am now a judge of the Circuit Court of Cook County.

Approximately 15 cases in which Reese Hubbard represented one of the parties have been assigned to affiant for trial. Five cases in which Reese Hubbard was counsel were tried to a verdict with a jury. Each of the 5 cases consumed a week or more. One of said cases was on trial for 4 weeks.

In each of said cases Reese Hubbard complied with the rulings of the court and tried the cases in accordance with the rules of law and was not guilty of any misconduct and did not conduct any improper cross-examination.

Further affiant sayeth not.

Elmer N. Holmgren.

Subscribed and sworn to before me this 29th day of August, 1966.

S. Walton Alexander,
Notary Public.

Exhibit G.

STATE OF ILLINOIS.
Thirteenth Judicial Circuit.

Chambers of
William J. Wimbiscus
Associate Judge
Spring Valley, Illinois

State of Illinois, }
County of Bureau. } ss.

William J. Wimbiscus, first being duly sworn, on oath deposes and says that he is an Associate Judge of the Thirteenth Judicial Circuit of the State of Illinois. That he was first elected Judge in 1933, and having been re-elected for successive terms he will have a continuous span of service of 37 years if and when the present term is completed in 1970.

That for almost 30 years he presided in the City of Chicago, in the Superior and Circuit Courts of Cook County, mostly the latter. That for a period in excess of 20 years attorney Reese Hubbard of One North La Salle Street was assigned to this affiant for trial in 30 cases, of which 17 went through to verdict, some cases taking as long as 10 days or more.

That at all times while on trial before the undersigned Mr. Hubbard conducted himself in an exemplary manner as a lawyer, that he followed the rules of the court, obeyed all orders, and otherwise behaved himself as a lawyer should.

William J. Wimbiscus.

Subscribed and sworn to before me this 27th day of August A. D. 1966.

(Illegible),

(Seal) *Notary Public.*

Exhibit H.

State of Illinois, } ss.
County of Cook. }

William V. Daly, being first duly sworn, says:

That affiant has been a judge for twenty-eight years, twenty-one of which were in the Municipal Court of Chicago and seven years in the Circuit Court of Cook County, Illinois.

During the past twenty years Reese Hubbard has represented one of the parties in an excess of thirty-five cases assigned to me for trial.

That he has tried to a verdict twenty or more cases.

In the numerous times that Reese Hubbard has tried cases before me he has conducted himself properly, has followed the rulings of the Court and has not been guilty of any misconduct and his cross-examination has been thorough but not unfair or improper.

William V. Daly.

Subscribed and sworn to before me this 31st day of August, 1966.

S. Walton Alexander,
Notary Public.

(Seal)

Exhibit I.

State of Illinois, }
County of Fulton. } ss.

I, Ezra J. Clark, being first duly sworn, say:

I am an Associate Judge of the Circuit Court of Fulton County, Illinois. Before the effective date of the Illinois Judicial Amendment, I sat in the Circuit Court and in the Superior Court of Cook County as a visiting judge for approximately 25 years.

Reese Hubbard, an attorney, was trying cases before me for 19 years. He had more than 50 cases in my court, and not less than 25 of said cases went to verdict. Twelve of said cases took more than a week to try; one took 2½ weeks.

I do further say that Reese Hubbard in the trying of cases before me never indulged in any misconduct at any time. He conducted himself in a lawyer-like manner and abided by the rulings of the Court.

Further affiant sayeth not.

Ezra J. Clark.

Subscribed and sworn to before me this 30th day of August, 1966.

Anna Laura Somers,
Notary Public.

(Seal)

Exhibit J.

State of Illinois, }
County of Cook. } ss.

George L. Quilici, being first duly sworn says:

He has been a Judge for 26 years. First of the Municipal Court of Chicago and for 4 years of the Superior and Circuit Courts of Cook County.

Reese Hubbard has had 17 cases which have been tried before affiant. Eight of them went to verdict.

In all the cases before affiant, Reese Hubbard conducted himself properly. He tried the cases in accordance with the rules of law, did not engage in any misconduct and abided by the rulings of the court.

George L. Quilici.

Subscribed and sworn to before me this 15th day of September, 1966.

Louise Halpin,
Notary Public.

(Seal)

Exhibit K.

State of Illinois, }
County of Cook. } ss.

I, Herbert C. Paschen, being first duly sworn, say:

I am a Judge of the Circuit Court of Cook County, Illinois, and have been a Judge for 4½ years. I was a Master in Chancery for 20 years.

Reese Hubbard had 6 cases before me while I was a Master. He has tried one case before me in the Circuit Court which lasted over 2 weeks.

Reese Hubbard, in all respects while before me, conducted himself properly. He was not guilty of any misconduct, nor did he conduct any improper cross-examination. He abided by the rules of law and the rulings of the court.

Herbert C. Paschen.

Subscribed and sworn to before me this 15th day of September, 1966.

S. Walton Alexander,
Notary Public.

(Seal)

Exhibit L.

CIRCUIT COURT OF ILLINOIS
Cook County

Judge John Gutknecht
In Chambers

Chicago, September 14, 1966

To Whom It May Concern:

I understand there has been some question arising with reference to an attorney, Reese Hubbard whom I have known for some more than twenty years.

Mr. Hubbard has practiced before me both in the Municipal Court of Chicago and in the Circuit Court of Cook County. My experience with him as a trial lawyer was in the 1940's and I have had some experience with him as a lawyer while I was State's Attorney of Cook County and also considerable experience with him on my return to the bench of the Circuit Court of Cook County in 1958. I would estimate that Mr. Hubbard has been before me in a trial of a case at least thirty-five times. In these thirty-five cases I would say at least some fifteen or eighteen have gone to verdict.

At all times while practicing before me, Mr. Hubbard has conducted himself in a manner as a lawyer should and at no time have I had any occasion to be critical of him either as to his conduct or manner of trying the case. He has been a serious lawyer representing his client in a serious manner but at no time have I found him violating any of the rules of the court or have I found him guilty of any misconduct.

I have always considered Mr. Hubbard a serious and conscientious practicing attorney.

Sincerely,

John Gutknecht.

Exhibit M.

September 16, 1966

To Whom It May Concern:

I have been informed that the conduct of attorney Reese Hubbard has been questioned in a proceeding pending in the Federal Court.

I have been a judge of the Circuit Court of Cook County for nineteen years. During the past fifteen years Reese Hubbard has had at least nine cases or more before me for trial. Of these cases five were tried all the way through to a verdict. Of the five cases, three took two weeks or more to try.

In each of these cases Mr. Hubbard was well prepared and defended his client with skill and in accordance with the rules of law in my judgment. At no time have I had occasion to criticize his conduct or manner of trying cases. He has not been guilty of any misconduct. His cross-examination of the witnesses, though at times extensive, was proper.

Sincerely,

Daniel A. Roberts,
Judge of the Circuit Court of Cook County.

APPENDIX E.

PETITIONER'S OPENING STATEMENT TO THE JURY (ATTACHED TO HIS AFFIDAVIT OF BIAS AND PREJUDICE, FILED JULY 5, 1966).

EXHIBIT "A."

Opening Statement.

Mr. Hubbard: May it please the Court, counsel, and ladies and gentlemen:

At this time it is my privilege to tell you what I believe the evidence will show on behalf of my client.

You shall not consider anything which I say as evidence. The only evidence you shall consider is what you will hear from the witness stand and such exhibits which the Court may permit to be received in evidence. This applies to everything which my opponent has stated to you, also.

The purpose of an opening statement is to enable you to follow the evidence. Sometimes it does not go in in consecutive order, and some of the evidence in some cases is quite complicated. There are no such complications here.

But I believe, on behalf of the defendant, the evidence will show that my client operates what is called the La Hacienda. It is a motel-like building consisting of mainly two floors. Near the lower floor are areas for parking, so that the guests who are at this establishment can park their cars. There is a wing, and if you can park there and go in that particular entrance in the vicinity of the room. It is, in effect, the pattern after a large motel.

I believe the evidence will show that the rooms in my client's establishment, each one was equipped with a lock, the room which counsel has told you about, 315.

At various parts on the building they would have a double room; that is, you would enter through the outside door, but there was a little alcove, you might call it, or some people say in order to make it quieter. There were these two doors, then there was an outside door, and that was true through most of the hotel or motel.

The evidence will show that each room was equipped with a lock. This lock was part of the doorknob. The doorknob had a button on the inside that the occupant of the room could turn it one way and the door would be unlocked; could turn it the other way and the door would be locked. So if someone were coming from the outside, they would have to have a key to unlock it.

I believe the evidence will show that these locks were on all of the rooms at the time in question, that they had been installed when the building was built. I believe the evidence will show that these locks were standard locks, and in general use throughout Nevada and elsewhere.

I believe the evidence will show that in addition to this lock that above the lock was a chain. This chain was attached to the frame of the door, and then there was a metal slot on the door itself, with a button, so the occupant of the room could take this chain and put it in this slot, and then the door could not be opened. I believe the evidence will show that this room had such a safety device on it on the day in question.

The evidence will show that the other rooms had also the same safety device.

The evidence will show that the lock in question was in good condition and that it would lock the door, provided that the button in the door handle on the inside was turned to the locked position. If it were turned to the other position, then the door would not be locked.

The evidence will show that my client had employees who

made periodic checks. The evidence will show that these checks were made on the evening in question.

The evidence will show that the plaintiff and her husband were assigned this room and they occupied this room, while they were there in Las Vegas.

The evidence will show that the facts concerning this unfortunate event are within the knowledge of the plaintiff and her husband, and no one else that we know of.

The evidence will show, so far as we have been able to learn, that on the evening in question the plaintiff and her husband made a round of the various establishments in Las Vegas, that they visited these establishments and they saw shows, they had dinner, and they had drinks.

The evidence will show that they returned at a time, the exact time we do not know. I believe the evidence will show that the plaintiff has not told us the exact time they returned.

The evidence will show that the plaintiff's version was that she and her husband returned after visiting the various other establishments in Las Vegas, the ones that they returned are known to themselves.

The evidence will show that after they returned that they had a drink, and were drinking, and the plaintiff left.

The evidence will show that the hotel, that there were two keys for each room, for each guest, if they so desired. They had requested one key, and they had one key. The other key was in the box at the time, and remained in the box, which is maintained and was in charge of a desk clerk during that entire period.

The evidence will show that during that evening that the husband was making repeated telephone calls to this room, and that the husband told the telephone operator that he and his wife had had a fight, and that she wouldn't let him in the room.

The evidence will show that some time around between 6:30 and 7:00 o'clock in the morning, at that time he asked that a maid come with a key. The evidence will show that it was not too distant for him to go to the desk and procure a key for himself, but he requested bring a key, and the maid who was on duty came with a key and opened the door.

The evidence will show that they discovered this terrible thing which had happened.

The evidence will show that the plaintiff, Donna Kiefel, her first version was that when she left her husband she requested from him the key and she took the key. She went to the room and entered the room and locked the door, went to bed, then remembered that her husband did not have a key, that she got out of bed, went to the door and unlocked it and then, before going back to bed, she turned on the light in the bathroom and left the bathroom door open.

Now the room itself, when a person enters the room after you enter the door, to the right is the bathroom, and when the bathroom light is on and the door open, that light is a strong light and it shines in the face of anyone that comes in the door, so any person that was looking could see and recognize such person.

The evidence will show that outside the door, and immediately above where the two doors are, there is another light, and it was a bright one, so that anyone opening the door, this light would shine on that person, so even though a person were lying in bed they could see that person as to who that person was.

I believe the evidence will show that the plaintiff stated after she had been in bed and had probably gone to sleep, that she looked up and she saw a man who she says was coming through the door, that she said "Carl," or something to that effect. She made no outcry whatsoever.

There were people in the adjoining room; any outcry could have been heard. The evidence will show that she made no outcry. The evidence will show that she received the injury.

There is other evidence which I will leave to be told to you by the witnesses. They can state it much better than I can.

The evidence will show, ladies and gentlemen, that my client exercised care in the operation of this hotel, that it was properly equipped, and that it did everything which it was required to do under the law for the protection of its guests.

The evidence will show that this occurrence, whatever it was, if it was a stranger, as they have told you, then she should not have left the door unlocked. Had she locked the door and kept it locked, this event would never have occurred.

I thank you.

APPENDIX F.

EXCERPTS FROM PETITIONER'S BRIEF IN THE COURT OF APPEALS.

(*re:* admissibility of declarations of Carl Kiefel.)

Though Carl Kiefel had been dismissed as a party, Hubbard believed that Kiefel's declarations were still admissible, under three well-recognized exceptions to the hearsay rule:

A. They showed his state of mind at the "critical" time. See *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 12 S. Ct. 909, 36 L. Ed. 706 (1892); *U. S.* v. *Annunziato* (C. A. 2, 1961), 293 F. 2d 373, 376-378; *Keshner* v. *Keshner*, 376 Ill. 354, 55 N. E. 2d 877 (1941); VI Wigmore on Evidence, 3rd Ed. (1940), §§ 1725, 1729, 1730, pp. 79-85, 91, 93-94.

Even though Kiefel was no longer a party, the first "critical question" in the injury case was whether Carl Kiefel or an intruder, inflicted the injuries. (See p. 6, *supra*.) Necessarily, Hacienda would not be liable if the then husband, a co-occupant of the room, inflicted the injuries.

B. Kiefel's declarations were admissible as explanatory of other independently admissible evidence.

Thus, his statement to the maid Carpenter, when she was admitting him to the room, were clearly admissible. (A. 560) When Security Officer Prolle entered the room, he told Kiefel not to touch anything, lest he destroy the fingerprints thereon. (A. 603, 613.) Immediately, Kiefel grabbed the assault weapon, thereby destroying any fingerprints. (A. II 98) Further, there was evidence that he

rendered no assistance to his critically-injured wife, and that he failed to accompany her to the hospital. (A. 45, 301)

Kiefel's declaration to the operator would be explanatory of his reasons for the foregoing conduct. See *U. S.* v. *Annunziato* (1961), 2 Cir., 293 F. 2d 373; *Fitzgerald* v. *Benner,* 219 Ill. 485, 494, 76 N. E. 709 (1906); *Yarborough* v. *Prud. Ins. Co.* (1938), 5 Cir., 99 F. 2d 874, 100 F. 2d 547.

C. Kiefel contracted for the trip and the room for himself and plaintiff. They occupied it jointly. She sued for nonperformance of the contract. Hence, his admissions were admissible against her.

See *Forsyth* v. *Doolittle,* 120 U. S. 73, 74, 30 L. Ed. 586 (1877); *Miller* v. *Mathias,* 145 Ill. App. 465, 466 (1908); *Hayes* v. *Claessens,* 234 N. Y. 230, 137 N. E. 313 (1922); *Ken* v. *Clements,* 148 Pa. Super. 378, 25 A. 2d 734 (1942); *Toler* v. *Bishop,* 84 Ill. App. 278, 280.

All other matters in the opening statement were proved. (A. 257, 539, 561; A. II 341-243, 271-273) Plaintiff herself admitted that "the light from the bathroom shone on his [the attacker's] face." (A. 192)

EXCERPTS FROM PETITIONER'S BRIEF IN THE COURT OF APPEALS.

(*re use of:* past decisions as evidence of "objectionable trial strategy.")

VII.

RELIANCE BY THIS COURT IN ITS FACT FINDING ON PAST DECISIONS IN WHICH RESPONDENT WAS NOT A PARTY, AS EVIDENCE OF A GENERAL DISPOSITION TO ENGAGE IN "OBJECTIONABLE TRIAL STRATEGY" WAS UNPRECEDENTED, AND, WE SUBMIT, DANGEROUSLY UNCONSTITUTIONAL.

Directly in point is *In re Los Angeles County Pioneer Society,* 217 F. 2d 190 (1954), reversing 126 F. Supp. 39, wherein the Court of Appeals reversed an order of disbarment entered without prior notice of the charge or an opportunity to prepare and present a defense.

In a well-reasoned opinion by Judge Denman, the Court of Appeals emphasized that since the alleged contempt did not occur in the *actual* presence of the court, constitutional due process was denied an attorney by failing to inform him that his disbarment is being considered and by failing to give him an opportunity to prepare and present a defense. Hence, the Court of Appeals ruled, the order of disbarment was absolutely void.

Similarly, the collateral, conclusive use by Judge Robson, in his ruling on the petition for costs and attorney's fees, of his prior determination in ruling on the post trial motion in the civil proceeding, renders his finding of liability for costs and attorney's fees void for want of due process.

Further, the past cases relied on by the courts are capable of easy explanation, and do not even reflect on the general character of Reese Hubbard.

The authority most relied on by the Court of Appeals to show the "intentional misconduct" of the respondent, Reese Hubbard, in these two trials was *Quality Molding Co.* v. *American Nat. Fire Ins.*, 283 F. 2d 313 (C. A. 7, 1961).

Indeed, the inference of "intentional misconduct" in the two *Kiefel* trials from certain language in the *Quality Molding* opinion is almost the *major premises* of the *Kiefel* opinion. This Court's discussion of *Quality Molding* covers nearly four pages of the printed *Kiefel* opinion. About *Quality Molding,* the Court wrote (*Kiefel* v. *Hacienda,* 404 F. 2d 1167-1170).

> "In Quality Molding Co. v. American Nat'l Fire Ins. Co., 287 F. 2d 313 (7th Cir. 1961), Reese Hubbard on behalf of the plaintiff, seriously misquoted an important precedent both in the trial court and in the brief filed in this court. After showing the nature of the misquote, the court held, 287 F. 2d at 316:
>
> > " 'We would much prefer to think the omission of the all important words was inadvertent. However, counsel for defendants states the same omission was made in the District Court, and the misquotation was specifically called to the attention of plaintiff's counsel in the trial brief which was filed by defendants.
> >
> > " 'A sloppy mistake in a quotation might be at least understandable on the part of a careless attorney. But, a deliberate misquotation calls for a strong condemnation. However, we do not initiate displinary action in this Court because there is a bare possibility that the fact that counsel's quotation was not correct might not have come to the personal attention of the attorney preparing the brief in this Court.
> >
> > " 'Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinions of other courts as well as other statements therein are completely accurate.'

"Because of the serious consequences which may result from that type of misconduct, this court was most reluctant to find that the misquote was intentional.

* * * * *

"* * * The unprofessional conduct in these two trials and in the history of Hubbard's practice as shown by prior appellate opinions is outrageous in nature. In *Quality Molding,* we declined to assume that his misquotation before this court was intentional. We can no longer indulge in an assumption of inadvertence, especially as to the misconduct shown in this case. * * *"

But, the facts are that Reese Hubbard had nothing whatsoever to do with the handling of *Quality Molding* either on appeal or in the trial court. (See the affidavit of A. G. Hubbard, A. III 73-75, who was both the trial and appellate lawyer in Quality Molding.)* Reese Hubbard's name appeared on the brief only as part of a firm designation in this Court.

As is shown by the affidavit of A. G. Hubbard, he intended to insert asterisks in the quotation in the brief in this Court, because the matter had been called to his attention in the trial court. Months later, when the matter was briefed on appeal, he overlooked the necessity of correcting this mistake. (A. III 75)*

The omission was not serious, and did not change the meaning of the authority cited. The issue in *Quality Molding* was whether a judgment bore interest during the pendency of plaintiff's unsuccessful appeal therefrom on the grounds of inadequacy. The Court held that it did not, rejecting an Illinois authority, *Johnson v. San. District,* 269 Ill. App. 429, which read as follows as quoted in *Quality Molding,* 287 F. 2d 313, 315-316):

"'We do think it is sufficient for the appellant to say that because the appellee appealed the case, it

*Note, the affidavit referred to is printed below at pp. A. 76-78.

> put it beyond the power of appellant to pay the sum of money that had been awarded as damages to the appellee. The appellee had a right to appeal from the decision of the county court. It was the right given him by law, and the mere fact that he prosecuted his appeal, as he was entitled to do under the law, should not prevent him from recovering interest *when the appellant entered and took possession of the property and exercised its rights of ownership over the same.*' "

The italicized language is that which was omitted without showing asterisks or dots.

The issue in the quoted case was whether an eminent domain judgment, bore interest during the landowner's appeal. Under the statute, Cahill's Ill. R. S. 1931, ch. 47, § 10, the order upon the report of the jury was not a judgment unless and until the condemnor took possession. Therefore, there was no judgment until the condemnor took possession. The citation was thus squarely in point.

Finally, *Quality Molding* was later held to be an incorrect interpretation of Illinois law regarding interest on judgments. *Pinkstaff* v. *Penn. R. Co.,* 31 Ill. 2d 518, 522 (1964).

Nor does the case of *O'Shea* v. *Jewel Tea Co.,* 233 F. 2d 530 (C. A. 7, 1956) reflect on the issues in this case or on the general character of Reese Hubbard. There the Court of Appeals reversed a plaintiff's judgment because of the failure of the trial court to admit a doctor's record. The Court of Appeals held the records had been properly identified so as to be admissible under the Federal Business Records Act, as against a contention that the elderly doctor was too blind to see and identify them. During a colloquy *outside the presence of the jury,* 233 F. 2d 530, 533, respondent stated he had evidence that Dr. Plice was not so blind as plaintiff's counsel thought. The Court stated that if Hubbard had produced this evidence, it

would have made the admissibility question easier, but that there was other "undisputed testimony" identifying those records.

No assertion of misconduct was made by plaintiff's counsel at the absence of this evidence. However, to read the treatment of this case in the *Kiefel* opinion (404 F. 2d at p. 1167), one might gather that in *O'Shea* v. *Jewel Tea,* 233 F. 2d 530, Hubbard, had stated in the *presence of the jury* that he would produce witnesses on the issue, and then failed to produce them. Review of the opinion, and, more particularly, of the briefs in *O'Shea* fails to show any issue whatsoever of misconduct on this point.

The decision in *Mangan* v. *Broderick & Bascom Rope Co.,* 351 F. 2d 24 (C. A. 7, 1965), upon which the Court of Appeals places such reliance, as evidence of "intentional misconduct" (404 F. 2d at 1167-1168) shows only that the Court of Appeals failed to follow Illinois law in a diversity case. The supposed misconduct consisted of cross-examination to show the interest of witnesses, who were employees of Schwitzer & Company, the principal beneficiary of the lawsuit. After numerous conferences the trial court ultimately ruled that the cross-examination was proper.

In so doing, the trial court followed the well-reasoned opinion of the Illinois Appellate Court in *Mokrzycki* v. *Olson Rug* (1960), 28 Ill. App. 2d 117, wherein it was held that where a witness's employer was a beneficiary of the suit, the interest of the witness may be shown. The Supreme Court of Illinois denied leave to appeal. The decision has never been questioned in Illinois. The Appellate Court (28 Ill. App. 2d 117, 125-127) analyzes the basis for showing the interest of a witness and cites a wealth of authority, 28 Ill. App. 2d at pp. 125-126, which are in point. The Appellate Court relied heavily on the fact

that "[t]he Evidence Act provides that the interest of a witness may be shown for the purpose of affecting the credibility. Ill. Rev. Stat. 1959, chap. 51, § 1." (28 Ill. App. 2d at p. 126.)

Under the foregoing decision and statute the entire cross-examination of the doctor, of Borchardt, and of Schweitzer's office manager were completely proper. (As to the doctor, *Kiewert* v. *Balaban & Katz,* 251 Ill. App. 324, 350, is directly in point.) But, the Court of Appeals refused to follow the *Olson Rug* decision, describing it as "sheer folly." (351 F. 2d 24, 29)

Nor is there a basis for the ultimate criticism levelled, of examining a witness on an exhibit never offered in evidence. (351 F. 2d at 31) Rarely is there a case in which some witness is not asked about an exhibit not in evidence. This is proper unless the court sustains objection.

The rule is stated in 98 C. J. S., Witnesses, § 405, pp. 207-208:

> "§ 405. Use of Maps, Diagrams, Photographs, Writings, Grand Jury Notes.
>
> • • • • •
>
> "Maps and diagrams, photographs and *writings, even though not offered in evidence, may be used in the cross-examination of a witness;* but their use for purposes of the inquiry may be denied or controlled by the court in a reasonable exercise of discretion." (Emphasis supplied.)

Further, it is not true that Hubbard failed to offer the exhibit, or had no intention of offering it. After the witness gave identifying testimony concerning the exhibit, Hubbard offered the exhibit. The court admitted it in evidence, and then refused it. There was no further examination of the witness on the subject. (See page 603 of the *Mangan* appendix which we have reprinted at A. III 78-79.)

In *Neusus* v. *Sponholtz,* 369 F. 2d 259, also relied on by the Court of Appeals to show "intentional misconduct" in the two Kiefel trials (404 F. 2d at p. 1168), respondent asked an expert witness if he had not testified in the "Willie Bishop" case. Respondent made the error of not having a witness available in Illinois to show the expert had in fact testified in the "Willie Bishop" case [in Michigan]. Since then respondent has procured a transcript of the expert's testimony in the Willie Bishop case. He had testified just three years before. (See the Bishop transcript, reprinted at A. III 80-81.)

Further, it is unlikely that there was error in this cross-examination. The law is well established that as to contradictory matters which are essentially "collateral," the examiner is permitted to inquire of them on cross-examination, but is not permitted to introduce "outside testimony." In such instance, the impeacher "must rest content with the witness's admission or denial." III Wigmore on Evidence [3rd Ed. 1940], § 1023 ("Cross Examination to Self-Contradiction, Without Extrinsic Evidence").

As the authorities cited by Dean Wigmore make clear, his statement has been the traditional rule, namely, that the impeacher need not "follow through" on impeachment with extrinsic evidence in every instance, but, that he has the option, and indeed the duty, if the matter is "collateral," to "rest content with the witness's admission or denial."

Dean Wigmore correctly stated:

> "There is therefore no objection either of principle or of policy, to such an attempt to prove the self-contradiction by the witness himself.
>
> "Moreover, it is not uncommon to obtain, by cross-examination alone, an adequate exposure of the witness's inconsistencies; and *no artificial limits should be set for its employment.*" (Emphasis supplied.) (3 Wigmore on Evidence, 3rd Ed. 1940, § 1023, p. 701.)

See also *People* v. *Sorge,* 301 N. Y. 198, 93 N. E. 637, 639, wherein Judge Fuld stated:

> "A negative response will not fob off further interrogation of the witnes himself, for if it did, the witness would have it within his power to render futile most cross-examination."

A review of the extensive authority cited by Judge Fuld and by Dean Wigmore must lead to a conviction of the wisdom of their view that this area is one for case-by-case analysis by the trial judge, without what Wigmore calls "artificial limits." On such a basis a court can easily determine if an examiner is attempting to seek truth from the witness, or is attempting "the production of extrinsic evidence." *People* v. *McCormick,* 303 N. Y. 403, 103 N. E. 2d 529.

On such a basis it is clear that Hubbard was not guilty of misconduct in *Neusus.* The witness had in fact testified in the "Willie Bishop" case. The issue only went to the witness's credibility, not the merits, so that there could not in any sense be thought to have been any improper attempt by Hubbard to offer "extrinsic evidence" without proof. Under the traditional rule, stated by Dean Wigmore, there was no misconduct in *Neusus.*

What has been said with regard to *Neusus* applies with compelling force to Judge McCormick's opinion in *Cline* v. *Kirchwelm Bros.,* 42 Ill. App. 2d 85, 191 N. E. 2d 410 and *Ryan* v. *Monson,* 33 Ill. App. 2d 406, 179 N. E. 2d 449. In each instance adherence to the traditional rule of law, stated *supra* by Wigmore, would have prevented the principal findings of error. Indeed, the novel requirement that an impeacher must "follow through" with extrinsic evidence in every instance dates principally from those decisions and from *Neusus.*

Hubbard procured a transcript of proceedings of *Ryan* v. *Monson,* 33 Ill. App. 2d 406 and in his Answer to the Petition for Costs and Attorneys' Fees showed in detail that there is no basis of any of Judge McCormick's criticism. (A. 100-119)

In the case of *Cline* v. *Kirschwehm Bros.,* 42 Ill. App. 2d 85, Judge McCormick made similar criticism of Kirkland, Ellis, Hodson, Chaffetz & Masters, one of the largest and most highly respected law firms of Illinois. That case was tried before the Honorable Wilbert F. Crowley, one of Illinois' most highly respected judges. Judge Crowley stated under oath that Reese Hubbard has always conducted himself properly before him. (A. 126)

As to the Court of Appeals' Statement concerning *People ex rel. General Motors Corp.* v. *Bua,* 37 Ill. 2d 180, Reese Hubbard's Answer denied "that Reese Hubbard had any part in determining whether records of General Motors would be produced, and as to which records should be produced." (A. 119-120) The discovery decisions were made by staff counsel of General Motors, as the opinion of the Illinois Supreme Court duly reflects. 37 Ill. 2d 180 at pp. 186 ("production in Detroit"), 187 ("one of its staff attorneys") Hubbard was nowhere named.

Nor is anything which took place at the second trial could affect the validity of the judgment for costs and attorney's fees previously entered.

Each of the charges from the second trial is carefully analyzed in our brief filed before Judge Decker on August 8, 1969 (A. III 53-61). None have any merit.

The judgments below should be reversed.

THE AFFIDAVIT OF ALVIN G. HUBBARD.

State of Illinois }
County of Cook } ss.

Alvin G. Hubbard, being first duly sworn, deposes and says:

1. That I am the senior partner of Hubbard, Hubbard, O'Brien & Hall, attorneys for Las Vegas Hacienda, Inc. in this case.

2. That Reese Hubbard handled the trial aspects of this case; that I have been solely in charge of the appellate aspects of this case, assisted by Frederick W. Temple, an employee of this firm; that Reese Hubbard has had no part in the preparation or handling of any of the appellate aspects of this case.

3. That the facts and matters stated in section 6, pp. 4-7 are true and correct.

That the legal theory behind the Notice of Appeal of October 25, 1966 was the product of my own thinking and legal research, performed shortly before that time.

That it was not known until shortly before October 24, 1966 that the order to be entered that day would be appealable. The court determined the amount of the judgment on October 18, 1966 and directed plaintiff's counsel to bring in a draft of judgment after showing it to defense counsel.

That plaintiff's counsel were advised immediately after entry of that judgment (to wit, the very next day) of our legal theory that jurisdiction of the entire case had been transferred to the Court of Appeals by the Notice of Appeal. Under our theory no special language was necessary in the Notice of Appeal from the final judgment of October 24, 1966 to bring before the Court of Appeals the interlocu-

tory new trial order of February 28, 1966. But, we inserted such language so as to advise the court and plaintiff's counsel of the position that we would take. We immediately advised Judges Robson and Decker of our position. (See Exhibit "C".)

Our jurisdictional position was taken in good faith and was sound under the authorities. See *Conney* v. *Erickson,* 317 F. 2d 247, 248 (C. A. 7, 1963) and 6 Moore's Federal Practice, 2d Ed. 1965, § 59.15(1), pp. 3896-3897, discussed at pp. 4-5.

The facts and matters stated on page 44 are true and correct.

4. The facts and matters stated at pages 31-34 concerning the case of *Quality Molding* v. *American Nat'. Fire Ins. Co.,* 287 F. 2d 313 (C. A. 7, 1961) are true and correct.

Reese Hubbard had no connection with that case other than that I placed his name on the briefs therein as a part of a firm designation which I then used in federal court appeals.

Reese Hubbard did not try the case, prepare the pleadings or briefs in the case, or advise in any way on the handling of any aspect of this case.

I personally tried the case, and prepared all pleadings and briefs in the trial court and the Court of Appeals.

[This was a commercial, rather than a personal injury, case. Reese Hubbard has specialized over the years in handling the personal injury cases in our office. Non-personal injury cases fall under my charge, as do appeals.]

It was simply a clerical error that the omission of 17 words at the end of a sentence quoted in a brief was not indicated by dots or asterisks. I intended to show the omission, particularly when the matter was called to my attention in the trial court by opposing counsel. When

months later, I briefed the case in the Court of Appeals, I had forgotten completely about the necessity of correcting this error.

Further, for the reasons stated at pp. 33-34, my inadvertent omission was not prejudicial.

.....

Alvin G. Hubbard

Subscribed and Sworn to before me this ..... day of ....., 1969.

.....

Notary Public.

APPENDIX G.

MOTIONS TO DISQUALIFY JUDGE ROBSON FROM CONTINUING IN CASE; ORDERS RULING ON SAID MOTIONS.

ORDER GRANTING NEW TRIAL AND COURT DISQUALIFYING SELF.

(Entered February 28, 1966.)

Court rules orally from bench granting plaintiff's motion to set aside verdict and to grant new trial and order verdict hereby set aside and new trial granted. Court disqualifies self and order cause transferred to the Executive Committee for reassignment in accordance with the rules.

MOTION THAT EDWIN A. ROBSON PROCEED NO FURTHER.

(Filed July 5, 1966.)

Las Vegas Hacienda, Inc., defendant, moves that the Honorable Edwin A. Robson proceed no further herein, but that another judge shall be assigned to hear this proceeding. In support of this motion movant presents its affidavit of bias and prejudice and the certificate of its counsel and memorandum of law.

ORDER DENYING DEFENDANT'S MOTION TO HAVE COURT DISQUALIFY SELF.

(Entered July 12, 1966.)

Court rules orally from bench denying defendant's motion to have Court disqualify self from hearing of plaintiff's petition for attorneys' fees and costs, etc. and order defendant to file answer to said petition on or before Sept. 5, 1966 with plaintiff to file reply thereto on or before September 19, and case continued to Sept. 20, 1966 to set for hearing on said petition and answer. Order leave to plaintiff to add additional Page 14 to petition for costs, etc.

EXCERPTS FROM
MOTION OF PLAINTIFF TO ASSESS COSTS AND ATTORNEYS' FEES.

(Filed June 13, 1966.)

Now comes plaintiff, Donna M. Kiefel, by her attorneys, Westbrook, Jacobson and Brandvik (James A. Brandvik and Lowell H. Jacobson), and prays that the Court enter an order assessing costs and attorneys' fees personally against defendant's attorney, Reese Hubbard, pursuant to the Court's finding (in its written opinion) on February 28, 1966, that Attorney Reese Hubbard has been guilty of unprofessional conduct and that said conduct was the sole grounds for granting plaintiff's motion for new trial and in support thereof states as follows:

1. That on February 28, 1966, the Court granted plaintiff's motion for a new trial in the above-entitled cause and in so doing made a finding that the sole ground for granting said motion was the unprofessional conduct of Attorney Reese Hubbard during the course of the trial, all as elaborated in the Court's remarks and written opinion of that date, reported in 39 F. R. D. 592-596.

* * * * *

EXCERPTS FROM

ANSWER AND JURY DEMANDS OF DEFENDANT AND REESE HUBBARD.

(Filed September 16, 1966.)

Reese Hubbard demands trial by jury as to every issue triable by jury.

Las Vegas Hacienda, Inc. demands trial by jury as to every issue triable by jury.

1. Las Vegas Hacienda, Inc., denies that this court has any jurisdiction to assess costs since the case is pending before another court and the court has no jurisdiction to assess costs until the conclusion.

2. Reese Hubbard denies that the court has any jurisdiction to assess costs against him in this proceeding.

3. Reese Hubbard denies that the court has any jurisdiction to assess costs prior to a termination of the case and shows that the case is pending before the Honorable Bernard M. Decker.

4. It would be an abuse of discretion for this court to attempt to assess costs in a case assigned to another judge and there waiting for trial.

5. Las Vegas Hacienda, Inc. and Reese Hubbard deny the statements in the opinion of the Honorable Edwin A. Robson referred to in paragrpah 1 of the motion; deny that said statements were or are supported by any evidence; deny that Reese Hubbard has been guilty of any unprofessional conduct and further that the statements contained in the said opinion are untrue. Under the law Reese Hubbard cannot be found guilty on caprice and unsupported assertions of plaintiff's counsel. No charges were ever brought against him. He has never been given an opportunity to meet such supposed charges. He is entitled to

see and cross-examine the witnesses against him. He is entitled to a presumption of innocence until some sort of proof other than caprice and the unjustified accusations of plaintiff's counsel is brought against him.

• • • • •

ORDER ALLOWING MOTION FOR ASSESSMENT OF COSTS.

(Entered October 10, 1966.)

Court rules orally from bench: Order plaintiff's motion for assessment of costs and attorneys' fees against defendant's attorney or defendant on the first trial granted. Order defendant's motions to have issues heard by jury; for assessment of costs against plaintiff, Carl Kiefel; and to expunge order of February 28, 1966 denied. Order cause continued to October 18, 1966 for report on conference re amount of costs and attorneys' fees and determination as to who specifically costs will be assessed against.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1498

REESE HUBBARD,

Petitioner,

vs.

DONNA M. KIEFEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETER FITZPATRICK,
Ten South LaSalle Street,
Chicago, Illinois 60603,
CE 6-3914,

FREDERICK W. TEMPLE,
221 North LaSalle Street,
Chicago, Illinois 60601,
RA 6-2500,
Counsel for Petitioner, Reese Hubbard.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

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REESE HUBBARD,

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vs.

DONNA M. KIEFEL,

Respondent.

PETIION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Reese Hubbard, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in cases 15976, and 18157 (Consolidated).

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court (A. 35-41) is reported in 39 F. R. D. 592-596 and is printed in Appendix "B", pp. A. 11-A. 18.*

The opinion of the United States Court of Appeals for the Seventh Circuit on the first appeal is printed in Appendix "B", hereto, pp. A. 19-36, and is reported in 404 F. 2d 1163-1172.

The opinion of the Court of Appeals on the second appeal is printed at pp. A. 39-42.

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* The reference "A." throughout this petition is to our separately-bound Appendix.

JURISDICTION.

The judgment of the Court of Appeals on the second appeal was entered on December 23, 1970. (A. 39.)

The judgment on the first appeal was entered on November 15, 1968. (A. 19.) Rehearing timely sought was denied on January 6, 1969.*

An uncontested motion for a stay of mandate was denied by the Court of Appeals on January 20, 1971, but allowed by Justice Thurgood Marshall on February 5, 1971.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. May a federal judge, long after the trial of a civil case, summarily punish a trial lawyer for "objectionable trial strategy" through a substantial judgment, under the guise of "costs," without according that lawyer an evidentiary hearing as to disputed factual issues?
2. Can 18 U. S. C., § 1927, be extended to authorize such a procedure?
3. Under *Mayberry* v. *Pennsylvania*, No. 121, 39 L. W. 4133, was not the trial court required to refer plaintiff's motion for "costs" and "attorneys' fees," to

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* NOTE: Following the first appeal, certiorari was sought unsuccessfully at that interlocutory stage of these proceedings. *Cert. den.* 395 U. S. 908.

We have filed the petition in the recognition that this Court has often denied certiorari at an interlocutory stage of proceedings, but later granted it, to review the entire proceedings, when ultimately there was a final judgment. See, *e.g. Burnet* v. *J. Rogers Flannery & Co.*, 286 U. S. 524, 52 S. Ct. 497, 76 L. Ed. 1268, *reversing*, 3 Cir., 54 F. 2d 365; *Mercer* v. *Theriot*, 377 U. S. 152, 153-154, 12 L. Ed. 206, 208, 84 S. Ct. 1157 (1964); *Stern & Gressman*, Supreme Court Practice (4th ed. 1967), p. 27.

another judge because of the "marked personal feelings" of the court toward petitioner, which had already prompted him to decline to retry the case?

4. Is not a lawyer, accused of misconduct during the trial of a lawsuit, entitled as a matter of fairness, and due process, to:
   (a) advance notice of the charges to be defended;
   (b) an opportunity to confront and cross-examine his accusers;
   (c) an opportunity to present evidence corroborative of his factual statements made during trial, and
   (d) specific findings of fact and conclusions of law which would structure the issues on appeal?

5. Were not petitioner's rights violated, although the proceeding was called costs, rather than contempt?

6. Does 28 U. S. C. § 1927 create a new category of taxable "costs," or does that section simply shift to an attorney the burden of paying such items of "costs" as might otherwise be taxed to the client?

7. Does any other rule or statute permit taxation of attorneys' fees on appeal as costs? Or, does the policy of *Fleischmann* v. *Maier Brewing Co.*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967), extend to attorneys' fees on appeal?

8. Was it not error, and a denial of due process, to receive opinions from several past cases, in which petitioner was not a party, as evidence of "objectionable trial strategy"? Did not the Court of Appeals compound that error by basing its decision on matter which was neither urged to, nor relied on by the trial court?

Is such a change of theory at the review level constitutionally permissible?

9. Does not this entire proceeding to punish a lawyer summarily effectively nullify a statute especially enacted to protect the independence of the bar? 18 U. S. C. § 401; Rule 42, F. R. Cr. P.

Are not the courts bound by the strong public policy of that statute, which was intended as the only way to punish a trial lawyer?

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED.

The following statutory provisions, reprinted in Appendix A., pp. 6-9 are involved: 18 U. S. C. A. § 401 (p. A. 6); 18 U. S. C. A. § 1503 (pp. A. 6-7); 28 U. S. C. A. § 1912 (p. A. 7); 28 U. S. C. A. § 1913 (p. A. 7); 28 U. S. C. A. § 1920 (pp. A. 7-8); 28 U. S. C. A. § 1923 (p. A. 8); 28 U. S. C. A. § 1927 (p. A. 9)

Amendment VI (p. A. 9); Amendment VII (p. A. 9); and Amendment V (p. A. 10) to the United States Constitution are involved.

Rules 30 (pp. A. 1-2); 43 (p. A. 2); 52 (pp. A-2-3); 61 (p. A. 3) of the Federal Rules of Civil Procedure are involved. Rule 42 (p. A. 4) of the Federal Rules of Criminal Procedure is involved. Rule 39 (a, c, d, e) of the Federal Rules of Appellate Procedure (pp. A. 4-5) is involved.

STATEMENT OF THE CASE.

Petitioner was defense counsel is a personal injury suit which was tried twice in U. S. District Court for the Northern District of Illinois.

The district court had jurisdiction by reason of diversity of citizenship.

The first time, in November, 1965, there was a verdict of not guilty. The second time, in January, 1967, there was a verdict of $100,000. (A. 19-36.)

The two trials were before different judges ((1) Robson, and (2) Decker). The second trial resulted because the first trial judge (in February, 1966) granted a new trial because the court found that petitioner had been guilty of "objectionable trial strategy" in several instances. (A. 11-18, *infra.*) At that time, the court "disqualifie[d it]self" from any further proceedings in the case. (A. 79.)

Some eight months later (October, 1966) the same judge [Robson], as a sort of addendum to his prior grant of a new trial, reentered the case, and summarily entered a judgment for $8,171.56 in costs and attorneys' fees, against petitioner personally, for "objectionable trial strategy." (A. 43-45, 83.)

The plaintiff's motion for costs and attorneys' fees was not filed until many months after the grant of the new trial, and the court's order disqualifying itself. (A. 81.)

Petitioner denied the charges, and demanded trial thereon, before a jury, or a different judge. (A. 79, 82.) Both requests were denied. (A. 80, 83.)

Judgment was entered summarily, without any sort of evidentiary hearing, at which petitioner could confront his accusers, or present evidence corroborative of his statements of fact during trial. (A. 43-45; 83.) Nor were there any findings of fact and conclusions of law which might structure the appeal. (A. 11-18; A. 43-45.)

The first opinion of the Court of Appeals reduced the award against petitioner from $8,171.56 to $1,741.20, by eliminating the trial court's award of attorneys' fees, and deposition travel expenses.

But, it then increased plaintiff's recovery by allowing plaintiff's counsel their printing fees on appeal, $1,860.80, by remanding the case for an award to plaintiff of a sum up to one-third of their legal fees on appeal. (404 F. 2d 1163 at p. 1171; A. 19-36.) All of these awards were ordered against petitioner personally, and not against his client.

On remand the trial court [Decker] entered judgment for $1,741.20, pursuant to the directions contained in the opinion of the Court of Appeals. (A. 33, 46a.) That judgment and the judgment of $1,860.80, in printing costs, inserted in the mandate of the Court of Appeals, were paid at that time. (A. 46, 46a.) After a short hearing on the value of plaintiff's counsel's services on appeal, the court entered judgment for $4,000 in attorneys' fees. (A. 46, 46a.)* A $5,000 bond was set and filed.

On appeal those judgments were affirmed, on December 23, 1970. (A. 39-42.)

Petitioner seeks review and reversal of the three judgments: $1,741.20 ("costs"); $1,860.00, printing expense from first appeal; and $4,000.00, attorneys' fees. (*Infra*, p. A. 46, 46a.)

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* NOTE: This award is in addition to the $46,974.58 received by plaintiff's counsel out of the $117,436.47 paid to plaintiff, in the injury action.

Petitioner.

Petitioner is a trial lawyer in the City of Chicago, of very wide experience. Since his graduation in 1935 from the Harvard Law School, he has specialized in the representation of numerous insurance companies, in the defense of personal injury cases.* Thirteen sitting trial judges of both the state and federal Bench gave evidence of his honorable conduct and fairness as a lawyer. (A. 47-59.)

Personal Injury Action.

Donna Kiefel, plaintiff, was seriously assaulted in her hotel room at the Las Vegas Hacienda and sustained severe personal injuries. She sued Hacienda for $1,000,000. Her then husband, sued for loss of consortium, but his action was dismissed the morning of trial.

The Las Vegas Hacienda, defendant herein, was insured by one of petitioner's clients, The Royal Indemnity Company.

On their behalf petitioner acted as trial counsel in both trials.

The Charges of Misconduct Against Petitioner.

The first trial judge described the three critical questions in the injury case as follows (A. 12):

(1) Who inflicted the injuries, her husband or an intruder?

(2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched

* NOTE: II Martindale-Hubbell Law Directory (1971), p. 81 (a. v.); Best's Recommended Insurance Attorneys (1969-1970), p. 225) (Petitioner is a member of the International Association of Insurance Counsel, and regularly represents some 20 major insurance companies, including the Royal Liverpool Group, on whose behalf petitioner was retained in this case).

door, or plaintiff's negligence due to intoxication, or other circumstance?

(3) Did the assault proximately result from defendant's negligence in failing to provide an adequate lock on the door, or in not maintaining sufficient security guard in the corridor?

In the same memorandum, the trial court said that it was allowing plaintiff's motion for a new trial because it felt, "the jury might or could have been influenced" by "objectionable trial strategy" of petitioner in the following three particulars (A. 15-17):

(1) Insinuating in his opening statement, and in cross-examination of Carl Kiefel, that the plaintiff and her husband had an altercation, which defendant would prove by the husband's statement to a telephone operator [Dixie Tracy], and then failing to make the promised proof.

(2) Failing to file the uncertified deposition of a defense witness [Hamlin].

(3) Precluding the court appearance at the Chicago trial, of Stella Butterfield, the Las Vegas court reporter, who took the Hamlin deposition and an out-of-court statement from Hamlin.

1. What the Record Shows as to Charge 1 (Failure to Prove Matter in Opening Statement).

Plaintiff was assaulted with a champagne bottle about 5:20 a.m. on March 1, 1962. It was one of four which had been sitting on a table in the room. She was in bed at the time.

Her husband testified that he was still down in the casino gambling.*

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* NOTE: Between the trials, the Kiefels were divorced. He did not testify in the retrial.

Pretrial investigation showed that between 2:00 and 6:15 a.m., he had made a series of about 14 attempted telephone calls from a booth in the lobby, to his room. The telephone operator [Tracy] asked him why he did not get a key from the desk. He replied that his wife had put the chain on, because they had had words, and he could not get in.

Plaintiff's counsel took the statements of the proposed witness before trial and her name was on the pretrial witness list.

On the morning of the opening of trial, Carl Kiefel was dismissed as a party to the suit. However, the pretrial order was not amended to delist the witness.

Petitioner therefore described, without objection, the Tracy evidence in his opening statement. (A. 60-64.) Further, he brought her from Las Vegas to Chicago, to testify.

Petitioner could not present her evidence, because the court had ruled, during another witness's testimony, that he would not permit anything Carl Kiefel said outside his wife's presence, to be shown.*

"The Court: To anything that he said the objection will be sustained."

Further, when petitioner had attempted to cross-examine Carl Kiefel about the conversation with the telephone operator, the court sustained objection.

Though Kiefel had been dismissed as a party to the suit, petitioner believed that Kiefel's declarations were still admissible under three well-established exceptions to the hearsay rule. Ample authority supports his actions. This

* NOTE: The maid, who admitted Kiefel to the room with her latchkey, after the occurrence, was barred from testifying that Kiefel had told her that he had given his wife the key, and directed her to leave the door unlocked for him.

authority was cited to the trial courts and Court of Appeals.*

All other matters in the opening statement were proved. Plaintiff herself admitted that the "light from the bathroom shone on his [the attacker's] face."

No objection was ever made to the opening statement until after verdict.

2. What the Record Shows on Charge 2 (Failure to File Hamlin Deposition).

After the occurrence, and while a hospital patient, plaintiff admitted to five different people that she had left the door unlocked, for her husband. One person to whom she made the statement was a nurse, Sharon Hamlin, who recorded the conversation in the hospital record.

Petitioner naturally wanted to present her as a witness, but it was uncertain whether she could come to Chicago to testify, since she was a young married woman with a baby. Accordingly, her deposition was taken in Las Vegas, before reporter Stella Butterfield on October 22, 1965. One of petitioner's partners, Frank Hall, flew out to Las Vegas and took the deposition. The place of the deposition was the office of Singleton, Delanoy & Jemison, a law firm which frequently represented the Royal Liverpool Group of insurance companies, petitioner's client in this case. See pp. 12, 13, *infra*.

Late in October, the reporter brought it to the deponent for signature, and it was signed. It was not certified, since Butterfield had forgotten her seal. Butterfield thus left it with Hamlin.

A few days later, on November 4, 1965, two days after

* NOTE: The section of our brief in the Court of Appeals listing the authorities on this point is reprinted in the Appendix, A. 65-66.

the start of trial, Hamlin came to Chicago, and had it with her, uncertified, and left it at petitioner's office.

She then went to her family home in Baltimore, Maryland. Twelve days later, on November 16, 1965, she testified in this case.

While she was gone, petitioner had the deposition returned to Las Vegas for certification.

Petitioner's statements to the court about the whereabouts of the deposition were corroborated by the testimony of Hamlin, as well as by the factual assumption of the plaintiff's counsel's questioning at the second trial.*

Further, petitioner had neither the right, nor the duty, under Rule 30 (e, f), A. 1, 2, to file the uncertified deposition. *Indeed, the rules do not contemplate that anyone, but the reporter, shall have or file the original of a deposition.*

It was never clear that the witness could stay away from Las Vegas long enough to testify. Her child was ill. She stayed away nearly two weeks before testifying. Rule 30(f), F. R. C. P., required that the deposition be certified and filed by the reporter (Butterfield), if it were to be used by petitioner as evidence.

3. What the Record Shows as to Charge 3 (Precluding the Court Appearance of Stella Butterfield).

Hamlin finally testified on November 16, 1965, the next to the last day of trial. Plaintiff's counsel, thereupon, sought unsuccessfully to bring Butterfield, the reporter, to

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* NOTE: The only apparent contradiction is contained in a deposition of Butterfield, taken months later out in Las Vegas, on another aspect of the case, by counsel who were unfamiliar with the precise question involved.

After the first trial, the deposition was shuttled back and forth in Las Vegas, between Mrs. Hamlin and Mrs. Butterfield, for review, resignature and certification. The deposition was not taken in a sufficiently systematic way as to detail the precise chronology of events.

Chicago from Las Vegas to impeach Hamlin about an out-of-court statement she was alleged to have given in September, 1965 at her house.* He wanted to put her on on the morning of November 17, 1965, the last day of the trial, as a rebuttal witness.

The post trial motion contained an affidavit by Jacobson [plaintiff's counsel] that he called Butterfield on the afternoon of November 16, 1965, asking her to fly east and testify, and that she agreed. About 9:30 p.m., the affidavit continued, she called back to say she had purchased her ticket, but that an attorney named Singleton refused to release her from a deposition set for the next morning. Jacobson's affidavit continues, that he then called Singleton at his home (about 10:30 p.m.) asking rescheduling of the deposition, and was flatly refused.

Petitioner categorically denied having anything to do with any of the foregoing events. (A. 82-83.)

His demands to cross-examine Jacobson and to present evidence corroborative of his denial were refused. (A. 82-83.)

Neither Singleton, nor Butterfield, ever testified. Butterfield, however, gave a deposition, before retrial of the case, in which she denied talking to Jacobson personally (only his office girl), denied purchasing a ticket (only checked the flight schedule), and denied agreeing to come to Chicago on November 17.

All she agreed was to try to find a substitute reporter for Singleton's previously-scheduled deposition. Unable to find a substitute reporter in Las Vegas, she asked the office of Singleton, Delanoy & Jemison to reschedule the deposition. They refused, she said, stating that it was "a very important case."

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* NOTE: the impeachment issue was simply whether two answers made by Hamlin in the tendered transcript were verbatim accurate. The witness had stated that the transcript, which she had never before seen, was "substantially correct."

It is uncontradicted that Jacobson never contacted petitioner, to inform him of the problem, and ask him to intervene with Singleton.

Nor did plaintiff's counsel move to obtain the reporter's [Butterfield] appearance on November 18 [a Friday], when it became apparent that she could not make it to Chicago by November 17 [a Thursday].* Indeed, even if Singleton had agreed at 10:30 p.m., Nov. 16, 1965, to Jacobson's request, it is doubtful that Butterfield could have flown to Chicago and testified before Friday, November 18.

Plaintiff's counsel, however elected to go to the jury on November 17, without her testimony.

Such other factual matters as are relevant are stated in connection with the several points urged for certiorari and reversal.

REASONS FOR GRANTING THE WRIT; ARGUMENTS IN SUPPORT THEREOF.**

1.

Impartial Court.

Review should be granted, because the decision below is in direct conflict with *Mayberry* v. *State of Pennsylvania,* No. 121, 91 S. Ct. 499, 39 L. W. 4133 (1/20/1971).

In *Mayberry,* a judgment of contempt was entered summarily at the end of trial. This Court reversed, holding that the practical and proper course would have been for

* NOTE: Under Illinois law, such an attempt, and a motion for mistrial, or at least to continue, is an absolute prerequisite to the grant of a new trial because of the absence of a witness. *Pinkstaff* v. *The Pennsylvania R. Co.,* 23 Ill. App. 2d 507, 507-24, 163 N. E. 2d 728 (1959), *affirmed* 20 Ill. 2d 193, 170 N. E. 2d 139 (1961), *cert. den.* 365 U. S. 878, 81 S. Ct. 1029 (1961); *Kendall* v. *Limberg,* 69 Ill. 355; *Clark* v. *Chicago Rys. Co.,* 192 Ill. App. 358, 360 (1915); *Casey* v. *Sawyer Biscuit Co.,* 163 Ill. App. 145 (1911); *Mastin* v. *National Tea Co.,* 278 Ill. App. 60 (1934); *Nehring* v. *Ricker,* 126 Ill. App. 262 (1906).

** Summarized *infra* at pp. 33-34.

the trial court to refer the charges to another judge. Quoting *Cooke* v. *United States*, 267 U. S. 517, 539, the Court stated (91 S. Ct. at 504, 39 L. W. 4136):

> "'* * * All we can say upon the whole matter is that where conditions do not make it **impracticable**, or where the delay may not injury public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.'
>
> "We conclude that that course should have been followed here, as **marked personal feelings** were present on both sides." (Emphasis supplied.)

This Court further stated (91 S. Ct. at 504, 39 L. W. 4136):

> "'* * * A judge cannot be driven out of a case. Where, however, he does not act **the instant** the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the **marks** of the unseemly conduct have left **personal stings** to ask a fellow judge to take his place. * * *'" (Emphasis supplied.)

Continuing, the Court emphasized (91 S. Ct. at pp. 504-505, 39 L. W. at p. 4136):

> "'* * * At times a judge has not been the image of **'the impersonal authority of law'** (*Offutt* v. *United States*, 348 U. S. 11, 17) but has become so **'personally embroiled'** with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.
>
> "'* * * These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.' *Id.*, at 14.
>
> "'* * * 'Fair trials are too important a part of our society to let prosecuting judges be trial judges of the charges they prefer.' *Ibid.*"

Here, the "personal feelings" of the court [Robson] toward petitioner [Hubbard] were so strong that in granting the motion for new trial, the court had "disqualifie[d] it[self] from retrying the case. (A. 79-80.) Only months later, when the petition for costs and attorneys' fees was filed, did the judge [Robson] reintervene, to punish petitioner summarily.

The measure of the "personal involvement" and "marked personal feelings" of the trial court below, is indicated by the following quotation from the trial court's opinion, granting a new trial in the civil action, 39 F. R. D. 592, 596. (A. 17-18.)

> "* * * Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply **every sly trick and stratagem** to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant."

The statement was repeated by the Court of Appeals in 404 F. 2d 1163 at 1165.

Under *Mayberry* Judge Robson could not have summarily entered a contempt judgment of $8,171.56 **after** the civil trial, so "marked" were his "personal feelings," so "personally embroiled" was he with this trial lawyer, Reese Hubbard, your petitioner.

If the procedure of the court below is correct, the policy of the *Mayberry* decision, and many like it, will be frustrated completely, if an "angered" trial court simply changes the name of the proceeding, from "contempt," to "costs."

In *Mayberry,* there was a jail sentence of 11-22 years. Perhaps, this extreme sanction motivated the court to take

Mayberry. Lest it be contended, however, that its rule is governed by, and limited to such aggravated situation, the recent statement of Justice Blackmun and Chief Justice Burger in *Groppi* v. *Wisconsin,* 91 S. Ct. 490, 495, 39 L. W. 4150, 4152 [1/25/1971], is pertinent. "Nevertheless, **unfairness** anywhere, **in small cases as well as in large,** is to be **ferreted out.**" (Emphasis supplied.)

In *Mayberry,* the only impediment to a contempt judgment was the "marked personal feelings" of the trial court. There was no question as to what words defendant had uttered. There were no factual issues to be resolved by the taking of evidence concerning events which took place outside the courtroom.

By contrast, in the case below, apart from the "marked personal feelings" of the trial court, there was a further impediment to summary punishment of the petitioner. Resolution of the serious charges against petitioner turned on evidence of events which took place **outside** the presence of the court. (See pp. 18-22, *infra.*) It has long been well settled that summary punishment for contempt will not lie in any instance where, as here, "any elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for his knowledge of these elements * * *." *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 68 S. Ct. 499 (1948); *Cook* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925).

It is, of course, true that petitioner did not personally revile or insult the judge. But, the court reacted as if it had been personally vilified and insulted. Further, the charges, if sustained, were in a real sense the equivalent of personal insult.

Here, petitioner, a prominent and experienced trial lawyer, was made to appear to have: (1) **prevented** an important plaintiff's witness [Butterfield] from coming to Chicago to testify, and (2) to have **secreted** an important

deposition [Hamlin] during trial to prevent its use of cross-examination, and then to have **lied** openly to the court, during trial, about its whereabouts.

These charges absolutely enraged the trial court toward petitioner. These charges, if proven, we submit, were likely to provoke passion and "outrage" on the part of almost any court. 404 F. 2d 1163 at p. 1170, A. 31.*

In these circumstances, (1) because of the court's "marked," "personal feelings" about the charges, and (2) because their factual resolution required evidence of events which took place outside the courtroom, the trial court's only correct course, under *Mayberry* v. *Pennsylvania,* 91 S. Ct. at 499, 39 L. W. 4133, 4136 (1/20/1971), was to refer the petition, when it was filed, to another trier of fact, not bearing the "sting" of personal attack and having the "impersonal authority of the law", to determine if the charges were factually based. Indeed, the court had previously disqualified itself from retrying the civil case, presumably because of its personal feelings toward petitioner. (See pp. 5, 14-15, *supra.*)

Petitioner's timely request for trial of those charges, by a jury, or a different judge, was erroneously refused. A. ..... Because of the patent, direct, and substantial conflict between the judgments below and this Court's opinion in *Mayberry,* certiorari should be granted, and the judgment below set aside.

2.

Evidentiary Hearing.

In denying petitioner's right to an evidentiary hearing and to confront his accusers, the decision is in conflict with this Court's decisions in *Willner* v. *Committee on Character*

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* NOTE: Well it may be that they amounted, if true, to an "obstruction of justice." See A. 6-7. *Cf.* Concurring opinion of Chief Justice Burger in *Mayberry* v. *Pennsylvania,* 91 S. Ct. at p. 506, 39 L. W. 4136.

& Fitness, 373 U. S. 96, 103, 105, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 229, 231 (1963); *In re Oliver,* 333 U. S. 257, 259, 273, 275, 92 L. Ed. 682, 694, 695 (1948); *Greene* v. *McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959). See also *Berger* v. *Calif.,* 37 U. S. Law Week 3247, 89 S. Ct. 540, 541 (1969); *Barber* v. *Page,* 390 U. S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1969); *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965); *Holt* v. *Virginia,* 381 U. S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375 (1965); *In re Oliver,* 333 U. S. 257, 273, 92 L. Ed. 682, 2694 (1948); *In re Ruffalo,* 390 U. S. 544, 20 L. Ed. 117 (1968); *In re Murchison,* 349 U. S. 133, 99 L. Ed 942, 75 S. Ct. 623. See also *Brotherhood of Loc. Fire & Eng.* v. *Bangor & Aroostock R. Co.,* 380 F. 2d 570, 581 (D. C. Cir. 1967).

If the record in the civil case could be used collaterally and conclusively, as the courts below have done, then the foregoing decisions, and *Mayberry,* No. 121, are wrong.

The trial court attempted to avoid the effect of the foregoing decisions, on a theory that his personal presence and "observation" of the events of the first trial, eliminated any requirements of a fair trial, of confrontation, or of an evidentiary hearing. The argument proceeds on some sort of analogy to the direct criminal contempt rule. (Rule 42a, F. R. Cr. Pr.; A. 4) That rule permits summary punishment if the court "**heard** the conduct constituting the contempt and it was committed in the **actual presence** of the court." (Emphasis supplied.) But, that principle, even in contempt cases, does not apply "if any element of the offense are not personally observed by the judge, so that **he must depend on statements made by others for his knowledge of these elements** * * *." (Emphasis supplied.) *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925). In all other instances, there must be **a full evidentiary hearing.**

The prejudicial character of the court's failure to conduct an "evidentiary hearing" is most forcefully shown in connection with charge 3, namely that on November 16, 1965 petitioner caused a Las Vegas attorney, named Singleton, to refuse to release a Las Vegas reporter named Butterfield from a previously-scheduled deposition in another case [in Las Vegas], so that she could come to Chicago on one day's notice to testify in this case.* (See pp. 11-13, *supra.*)

This charge greatly angered the court. And, properly so. If proven, it might well have constituted a serious "obstruction of justice." 18 U. S. C., § 401, 18 U. S. C. 1503. A. 6, 7. But, petitioner categorically denied the carge.

Ordinarily, a trial lawyer's statement of fact is taken at face value. When it is not, an evidentiary hearing should be had. At such hearing, Singleton [the Las Vegas lawyer], Butterfield [the reporter], Hubbard [the petitioner], and Jacobson [the plaintiff's counsel], could have testified and been cross-examined.

Only at such a hearing could it be determined why Singleton refused to release Butterfield from a previously-scheduled deposition in another case. Only Singleton would know whether Hubbard [the petitioner] had contacted him on the matter. Only he could show the character of the deposition in the other case which he refused to continue. But, his evidence was never taken in this case.

Nor was Butterfield's. In a deposition later taken on another aspect of the case, she said Singleton told her he could not release her because of the importance of the previously-scheduled deposition. "It was an important deposition". (See p. 12, *supra.*)

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* NOTE: Significantly, plaintiff's counsel did not attempt to move for mistrial, or to continue the case one more day, to permit her to fly to Chicago to testify. (See p. 13, *supra.*)

Similarly, cross-examination of Jacobson [plaintiff's] might have closed the discrepancy between (1) his affidavit that the reporter Butterfield told him that she would come to Chicago to testify, and then reneged, and (2) her later deposition story, that she simply told him that she would come if she could get another reporter for Singleton's deposition of the next morning.

With respect to the charge of failure to prove matter in the opening statement, an orderly evidentiary hearing would have shown that the witness [Tracy] was brought to Chicago from Las Vegas, was in the courtroom, and was not presented because of the court's rulings as to her class of evidence.* (See pp. 8-10, *supra.*)

The remaining charge, of "improper tactics," relied on by Judge Robson, was that petitioner, Hubbard, had **secreted** the original of an uncertified deposition of a defense witness named Hamlin, and then lied to the court about its whereabouts. (See pp. 10-11, *supra.*) Petitioner claimed that he had sent it back to reporter Butterfield in Las Vegas, when he discovered the deposition had not been certified, because he thought he might have to use it as original evidence. (It was not clear until the last minute that the witness could be in Chicago to testify. Her testimony was not given until the next to the last day of the two-week trial.)

There is much contradiction and confusion in the civil record of the two trials, as to when and by whom the Hamlin deposition was returned to the reporter [Butterfield] in Las Vegas for certification. That confusion is vastly compounded by the *Butterfield* deposition, which was taken in

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* NOTE: We note that Tracy's name was still on the witness list at the time. No objection was made by plaintiff's counsel to any part of the opening statement, until after verdict.

All other matters stated in the opening statement were proved. (See p. 10, *supra.*)

Las Vegas months after the first trial by plaintiff's co unsel and which was directed to other aspects of the case. At an orderly, **evidentiary** hearing, **directed to the precise** ques- **tion,** Hamlin, Butterfield, and petitioner could have been asked explicit questions, by a court and opposing co unsel, **and** given **responsive, explicit** answers.

The proceeding below was far too unsystematic t to re- solve this serious charge made against petitioner. (See pp. 10, 11 and f.n., *supra.*)

To represent his client effectively, a trial lawyer si imply has to have his words taken at face value, as to what tran- spires outside the courtroom. Once a court begins to doubt the lawyer, in fairness to itself, in fairness to the la wyer [**and** his client], **and** as a simple matter of due pr ocess, the court ought then to conduct a proper eviden tiary hearing.

Petitioner was entitled to an evidentiary hearing o n the court's charges, after **advance, specific notice.** In *Re Ruffalo,* 390 U. S. 544, 88 S. Ct. 1220, 20 L. Ed. 2d 117 (1968), in the course of a disbarment proceeding, an addi- tional charge 13 was added. This Court held that adding the new charge denied procedural due process: the lawyer was entitled to **prior** notice that the matter in Charge 13 would be considered a disbarment offense.

Had Hubbard been accorded an evidentiary hearing, with specific findings of fact and conclusions of law, as req uired by Rule 52, the appeal would have been structured b y the findings. Hubbard then could not have been faced with (1) **ex parte** statements from other cases, (2) un tried charges not listed in the post trial motion, and (3) un tried charges from the subsequent retrial before Judge De cker, F. R. C. P. 52, F. R. Cr. P. 42. (See pp. A. 2-3, 4.)

Irrespective of whether Rule 52 required specific fin dings of fact and conclusions of law in the order grantin g the

new trial [February 28, 1966], such findings were required when the court later [October 10, 1966] decided to use that collateral determination as the sole factual basis for its "costs" judgment against Hubbard.

The object of Rule 52, requiring specific findings of fact and law, is to define the issues for appellate review and for application of the doctrine of **res judicata.** (5 Moore, Federal Practice, § 52.05(5), citing committee report.)

The patent inadequacy of the trial court's opinion, as findings of fact, is perhaps best illustrated in connection with charge 3, towit, that petitioner prevented the appearance of Butterfield, by causing Singleton [the Las Vegas lawyer] to refuse to release her from a previously-scheduled deposition. (See pp. 11-13, 19-20, *supra.*)

If Singleton refused to continue his previously-scheduled deposition, because of its importance (perhaps it was court set), or if he did so, because of his acquaintance with the insurer herein (See p. A. 17), thinking it would help them, but without ever discussing the matter with petitioner, there can be no basis for a finding of misconduct on petitioner's part.

To warrant any proceeding against petitioner personally, he must necessarily have communicated with Singleton or his office after Hamlin testified on November 16, 1965, to request them to refuse to release Butterfield on November 17, 1965.

But, the court did not find that Hubbard actually did anything, The court, rather, avoids a finding, by using such evasive, but emotionally-colored, phraseology, as (39 F. R. D. at 596; A. 17):

(a) he "hamstrung plaintiff's counsel in precluding the appearance of an out-of-town court reporter to testify . . ."

(b) ". . . **indications are** that counsel [Hubbard]

manipulated matters so that the court reporter would not be available . . ."

(c) "It is therefore evident that **improper pressure could have been** brought to bear to preclude the release of the court reporter . . ." (Emphasis supplied.)

Such language is completely insufficient, as a "recitation" of "facts" under the foregoing rules.

More important, such language is a patently inadequate circumlocution of the rule barring a court from punishing summarily if "any elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for these elements * * *." *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 2d 682, 695, S. Ct. 493 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925). That rule is eroded to a nullity, by the judgment below.

If the trial court could find only that there "**could have been**" misconduct on petitioner's part, in respect to the refusal of the Las Vegas lawyer, Singleton, to release his reporter, Butterfield from a previously-scheduled deposition, then the court was powerless to proceed summarily.

It was required, as a matter of due process of law, either to dismiss the charge, or grant petitioner's timely request for an evidentiary hearing.

A finding that impropriety "could have" occurred (39 F. R. D. at p. 562; A. 17) will not support punishment, summary or otherwise, under our system of justice.

Nor will the statement quoted at 404 F. 2d at 1163, that petitioner "uses every sly trick and stratagem to win his cases." Certainly, it is not a finding or a certificate which "recite[s] the facts" within the foregoing rules. *Widger* v. *U. S.,* 244 F. 2d 103, 107 (C. A. 5, 1957); *Tauber* v. *Gordon,* 350 F. 2d 843, 847 (C. A. 3, 1965).

As the latter court pointed out (350 F. 2d at p. 845):

> "Such a **general characterization** of behavior over a seven day trial period is not specific enough to satisfy the requirement of Rule 42a . . .
>
> "This requirement is more than a formality. It is essential to disclosure of the basis of decision to permit **informed appellate review.**
>
> "But, counsel's enumeration of occurrences which, in his view after the event, afforded a proper basis for the contempt order cannot be substituted for the required specification by the trial judge * * *" (Emphasis supplied.)

3.

Improper Use of Past Decisions.

The decisions below are in conflict with *Gregory* v. *City of Chicago,* 394 U. S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 734. In relying for its fact finding on charges from the second trial and from several opinions in other cases, the Court of Appeals has engaged in just that type of change of theory at the review level which was condemned in *Gregory,* and in *Ruffalo,* 390 U. S. 544, 88 U. S. S. Ct. 1220, 20 L. Ed. 2d 117 (1968), discussed *supra,* p. 21.

Further, at a proper hearing, it could be shown that there was no basis for the inferences of a pattern of misconduct on petitioner's part, which was drawn by the courts below.*

The principal decision, used adversely, *Quality Molding Co.* v. *American Nat'l Fire Ins.,* 287 F. 2d 313 (C. A. 7, 1961), did not involve petitioner in either the trial or appellate court. (See A. 67, 76-78.) In the remaining cases, the course of trial procedure criticized was supported by ample local precedent. (See A. 71-74.) That the Court

* NOTE: As part of the appendix, A. 67-75, we attach a copy of pp. 39-47 of our brief in the Court of Appeals, describing each of those opinions and charges.

of Appeals in cases such as *Mangan* v. *Broderick & Bascom Rope Co.*, 351 F. 2d 24 (C. A. 7, 1951); and in *Neusus* v. *Sponholtz*, 369 F. 2d 259 (C. A. 7, 1966), elected to impose tighter restrictions on cross-examination which was designed to show interest or bias, than were sanctioned by petitioner's authorities, does not reflect on petitioner's **general or specific** character.

Petitioner's procedure in *Mangan* had been expressly approved by the Illinois courts in *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 124, 170 N. E. 2d 635 (1960). (Interest of employer of witness to recover for workmen's compensation benefits paid may be shown.)* Petitioner's procedure in *Neusus* was approved by 3 Wigmore on Evidence [3rd Ed. 1940], § 1023 ("Cross Examination to Self Contradiction, Without Extrinsic Evidence"]. See also *People* v. *Sorge*, 301 N. Y. 198, 93 N. E. 637, 639. (See A. 73-74.)

Whenever a court decides between competing lines of evidence law, a court is normally attempting to balance the relevance of a given line of evidence against the possible prejudice therefrom. Necessarily, all courts will not reach the same results in such cases.

But, the advocate's role (the trial lawyer's role) in such instances, is radically different from that of the reviewing court, faced with competing principles of evidence law. In our adversary system of jurisprudence, the trial lawyer is not only permitted, but, indeed, we submit, duty bound to his client, to rely on and urge his point of law as forcefully and effectively, as possible.

Petitioner represented some of the most important insurance companies in America for over thirty years, following his graduation from the Harvard Law School. His practice

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* NOTE: *Mangan* has subsequently been rejected as authority on this point by the Illinois courts. *Skalon* v. *Manning, Maxwell & Moore*, 127 Ill. App. 2d 145, 156, 262 N. E. 2d 146 (1970).

was heavy and intense. It was devoted almost exclusively to the defense of insurance companies in personal injury litigation. (See p. 7, *supra.*)

Thirteen sitting judges of the state and federal courts, before whom he has tried over 300 cases, gave affidavits attesting his honorable conduct and fairness as a lawyer. (A. 47-59.)

Further, numerous appellate court opinions have absolved petitioner of charges of misconduct. See *e.g., Skalon* v. *Manning, Maxwell & Moore,* 127 Ill. App. 2d 145, 262 N. E. 2d 146 (1970); *Hendler* v. *Wolozin,* 105 Ill. App. 2d 132, 245 N. E. 2d 74 (1969), *cert den.,* 396 U. S. 929.

Significantly, in each instance, the opinions below were offered as (1) evidence of a "pattern of misconduct" and as (2) legal authority for the courts involved to look outside the record to several past cases in which petitioner was counsel. In both instances the Illinois courts rejected the *Kiefel* opinions for all purposes. Indeed, in the *Hendler* case, the Appellate Court, after lengthy deliberation, refused to permit the opinions even to be filed as an additional authority to plaintiff's previously-submitted brief.

In each instance, the court correctly elected to decide the case before it, **on its own record.** So ruling, the court found no evidence of misconduct on petitioner's part, and, therefore, affirmed the judgments entered on verdicts in favor of petitioner's clients.

What more potent example could there be, of the prejudice to petitioner, from the improper, indeed, we submit, unconstitutional, action of Judge Robson and the Court of Appeals, in relying primarily on matters dehors the record from opinions in several past cases in which petitioner Hubbard had been defense counsel, as evidence of "objectionable trial strategy" in this case.

Certiorari should be granted to review this unprecedented, and we submit, dangerously unconstitutional procedure. References to past offenses, even if properly proven, has long been the subject of the most severe condemnation. See Comment, 78 Harvard L. Rev. 426 (1964); Comment, 70 Yale L. J. 763 (1961); 10 Rutgers Law Review 531, 532 (1956); 1 Wigmore on Evidence, § 57, p. 546; 3 Wigmore, Evidence, §§ 896-918 (3rd Ed. 1940). As this Court itself has observed, such matter is rejected as unconstitutional, not because it is totally irrelevant, but because it "**tends so to overpersuade** [triers of fact] as to prejudice one with a bad general record and **deny him a fair opportunity to defend against a particular charge.** * * *" *Michaelson* v. *U. S.*, 335 U. S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168, 174 (1948). (Emphasis supplied.)

The several past decisions cited against petitioner are subject to explanation. (A. 68-74.) Further, **they are not a substitute for an orderly, evidentiary hearing directed to specific factual issues.**

There was not the slightest semblance of due process in these proceedings against petitioner.

4.

Attorneys' Fees.

The award of $4,000 of attorneys' fees is in direct conflict with this Court's decision in *Fleischmann* v. *Maier Brewing Co.*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967).

The judgment assessing one-third of all attorneys' fees in the three appeals is without foundation in American law and is in direct conflict with Rule 39(c, e) of the recently enacted Rules of Appellate Procedure, as well as with the recent decision of the Supreme Court in *Fleischmann* v.

Maier Brewing Co., 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967).

On the strength of *Fleischmann* the Court of Appeals reversed Judge Robson's judgment by eliminating the item of plaintiff's fees in the trial court. But, nothing in the *Fleischmann* opinion remotely suggested that it was limited to attorneys' fees in the trial court.

Rule 39(c) extended the costs allowable on appeal to briefs. (A. 5.) Had counsel fees been within this Court's contemplation when it made such amendments, they could easily have been permitted.

Similarly, Rule 39(e) makes taxable in the district court the costs of the reporter's transcript, the bond premiums and the filing fee in the district court. (A. 5.)

The Court of Appeals was thus not authorized to direct the trial court to determine and tax one-third of all counsel fees on appeal. Nor did the trial court have authority to enter judgment for $4,000 pursuant on remand.

If the trial court was forbidden by the *Fleischmann* case from awarding trial attorneys' fees for "objectionable trial strategy," certainly it could not award appeal attorneys' fees for "objectionable trial strategy."

Nor will 28 U. S. C., § 1912 (A. 7) sustain the award. In *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 616, 16 L. Ed. 2d 131, 138-139, 86 S. Ct. 1018 (1966), this Court stated that "additional costs, **although not attorney's fees**, may be assessed against * * * the losing party under 28 U. S. C., § 1912." (Emphasis supplied.)

Normally, an award under 28 U. S. C., §1912 is made only when an appeal has been dismissed on motion as unsubstantial or frivolous. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140, 33 S. Ct. 102.

Where, however, as here, the judgment appealed from

is reversed or simply reduced, a court may not assess additional costs under this section, which is by its terms limited to "damages and costs on affirmance." (A. 5.) *Globe Construction Co.* v. *Brewer,* 197 F. 2d 707, 708-709. (C. A. 5, 1952.)

5.

The Independence of the Bar.

Certiorari should be allowed to review the unprecedented construction given to 18 U. S. C., § 1927, and to review the relationship of that statute, to a statute especially enacted to protect the independence of the bar. 18 U. S. C., § 401. See also, Rule 42a, F. R. Cr. P. (Criminal Contempt, Summary Disposition) (A. 4, 6, 9.)

That statute, 18 U. S. C., § 401, as it has always been construed, would stand as a bar to these summary proceedings against petitioner. *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925). (See pp. 14, 16, 18, 23, *supra.*) If left to stand as precedent, the decisions below have the affect of nullifying that statute. 18 U. S. C., § 401.

Plaintiff made certain charges in a motion for a new trial. Petitioner denied those charges. The court refused petitioner the right to meet and disprove those charges. Petitioner made a timely motion for a jury trial, and before a different judge. That request was likewise refused.

18 U. S. C. § 401 (the current citation) was enacted, following the impeachment trial of Judge Peck, to restrict the contempt power of courts, so that it would not be used to discipline lawyers. We believe Congress intended to prevent the very thing done in this case.

The reviewing courts, when cases involving lawyers have come to their attention, always mention the historical fact

that this statute was passed especially to protect the independence of lawyers in the exercise of their profession. *Cammer* v. *United States,* 350 U. S. 399, 76 S. Ct. 456, 100 L. Ed. 474 (1956); *Re McConnell,* 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962); **reversing** 294 F. 2d 310 (C. A. 7, 1961); *DeParcq* v. *U. S. District Court for Southern Iowa,* 235 F. 2d 692 (8th Cir. 1956). The Courts emphasize the public policy reason for restricting the power of contempt by quoting the argument of Congressman Buchanan (350 U. S. 399, 406: **"The public have almost as deep an interest in the independence of the bar as of the bench."** (Emphasis supplied.)

In *Re McConnell* the Supreme Court reversed the contempt conviction of a lawyer who had been fined $100 for persistent interrogation of witnesses on an issue after it had been (erroneously) ruled out of the case by the trial judge. The lawyer stated: "We have a right to ask the questions, and we propose to do so unless some bailiff stops us." This Court said (370 U. S. 236):

> "The arguments of a lawyer in presenting his client's case strennously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.
>
> "• • • **An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.** To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the **least possible power adequate to prevent actual obstruction of justice,** and we think that that power did not extend to this case." (Emphasis supplied.)

In no sense did petitioner's conduct approach that of the trial lawyer in *McConnell.* The only matter stated in

the opening statement, which petitioner did not prove, was the substance of a conversation between a telephone operator [Tracy] and plaintiff's then husband. However, the court refused to permit the husband to be cross-examined about the conversation. Further, when petitioner tried to put on a maid [Carpenter], the court said it would not permit any statements by the husband, outside his wife's presence, to go into evidence.* (See pp. 8-10, *supra.*)

In marked contrast to the behavior of the advocate in *McConnell, supra,* p. 31, petitioner, properly, we submit, refrained from calling the operator, then available, to make an offer of proof, such as that which offended the trial judge in *McConnell,* 370 U. S. at 232. His deference to the court's ruling on this crucial evidence question was beyond criticism, as well as procedurally correct. Petitioner followed the example of the trial lawyer in *Bartholomew* v. *Davies,* 276 Ill. 505, 514-515, 114 N. E. 1017 (1917), rather than the example of the lawyer in the *McConnell* case.

If a judgment of this type could be entered against a lawyer, it would be a far greater threat to the independence of the advocate than the penalties attempted to be imposed in the *Cammer* and the *McConnell* cases.

Nothing said or done by Hubbard would constitute conduct within the power of the court to punish him for contempt, summarily.* The judgment under review is not a taxation of "costs" as that legal term is universally understood.

The rights of a court to enter judgment, without a trial, on the verity of its own observations is limited to matters within the contempt statute.

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* NOTE: The unproven charges relating to prevention or concealment or prevention of evidence, may well have charged an "obstruction of justice," but they required an evidentiary trial. (See pp. 18-23, *supra.*)

Summary punishment for contempt, moreover, will not lie in any instance where, as here, "**any elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for his knowledge of these elements * * *.**" *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925). (Emphasis supplied.)

In enacting and interpreting 18 U. S. C. § 401, Congress and the Supreme Court were not just protecting the narrow professional interests of lawyers. They were defending our adversary system, which cannot exist without an independent bar.

28 U. S. C., § 1927 was not enacted to enable a federal court to curtail the independence of the bar by ignoring the limitations of 18 U. S. C., § 401, and F. R. Cr. P., p. 42, on its power to punish a trial lawyer.

In attempting to place its authority for this vast, unstructured expansion of judicial power on a theory of inherent power (p. A. 41), the decisions are in the face of a century of legal tradition to the contrary.

Review should be granted to determine if the courts have been wrong in this period in thinking that such power did not exist, and in thinking that 28 U. S. C. § 1927 and its predecessors did not enlarge the categories of allowable costs, and were not enacted to enable a court to curtail the limitations of 18 U. S. C., § 401, and F. R. C. P. 42 on its power to punish a trial lawyer. See *Motion Picture Patents Co.* v. *Steiner,* 201 F. 63 (2d Cir. 1912); *Gold Dust Corporation* v. *Hoffenberg,* 87 F. 2d 451 (2d Cir. 1937); *In re Realty Associates Securities Corporation,* 53 F. Supp. 1013 (E. D. N. Y. 1943); *Bone* v. *Walsh Construction Co.,* 235 F. 901. (S. D. Iowa 1916.)

CONCLUSION.

A short, evidentiary hearing, at which Butterfield [the Las Vegas reporter], Singleton [the Las Vegas attorney], Hamlin, petitioner [Hubbard], and plaintiff's counsel [Jacobson] could have been examined and cross-examined would have resolved the very simple factual disputes of this case:

(1) Such a hearing would have shown when and by whom the Hamlin deposition was returned to Las Vegas for certification: to-wit, by petitioner's office during trial, or by Hamlin after trial. (Charge 2.)

(2) Such a hearing would also have shown whether petitioner [Hubbard] communicated with Singleton or his office on November 16 to urge him to refuse to release Butterfield from a scheduled deposition on November 17. (Charge 3.)

(3) At such a hearing Tracy (the operator) could have shown that petitioner brought her all the way from Las Vegas to Chicago to testify and that she actually in the courtroom to testify. (Charge 1.)

Moreover, such an evidentiary hearing, before another judge, was constitutionally required.

Petitioner is a widely-respected trial lawyer. Thirteen sitting judges of the state and federal courts, before whom he has tried over 300 cases, gave affidavits attesting his honorable conduct and fairness as a lawyer. (A47-59.)

He ought as a simple matter of fairness and due process to have been accorded an evidentiary hearing before a jury or different judge, to disprove the very serious charges made against him. The proceedings below are subject to the very same constitutional defects as those involved in *Wisconsin* v. *Constantineau*, No. 95, 91 S. Ct. 507, 39 L. W. 4128 [Jan. 29, 1971]. There, this Court stated (91 S. Ct. at 510, 39 L. W. 4129):

> "It is significant that most of the provisions of the Bill of Rights are **procedural**, for it is **procedure** that marks much of the difference between rule by law and rule by fiat.
>
> • • • • •
>
> "Where a person's good **name, reputation, honor**, or **integrity** are at stake because of what the government is doing to him, **notice** and **an opportunity to be heard** are essential. • • • Only when the **whole** proceedings leading to the pinning of an **unsavory label** on a person are aired can **oppressive** results be prevented." (Emphasis supplied.)

"Notice and an opportunity to be heard," here by way of an evidentiary hearing, are the first essence of the Due Process Clause. *Boddie* v. *State of Connecticut,* 39 L. W. 4294, 4295 (3/2/71).

These summary proceedings charging petitioner, a trial lawyer, with "objectionable trial strategy," are without foundation in rule, statute, and the constitution. They ignore a century of legal tradition, protecting the independence of the bar.

For the foregoing reasons, certiorari should be granted and the judgments for $1,741.20 in "costs," $1,860.00 in printing expenses, and $4,000.00 in attorneys' fees on appeal should be vacated, reversed and set aside.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1498

REESE HUBBARD,

Petitioner,

vs.

DONNA M. KIEFEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

All of the matters raised in the Petition for Writ of Certiorari in this Petition No. 1498 were raised and argued in the October Term, 1968 Petition for Writ of Certiorari filed by petitioner, Reese Hubbard, in Petition No. 1235. This Court denied certiorari on May 19, 1969 (cert. den. 395 U. S. 908, 23 L. Ed. 2d 221) and also denied rehearing on June 23, 1969 (rehearing den. 395 U. S. 987, 23 L. Ed. 2d 776). There are no new issues of fact and law argued in this petition that were not fully reviewed in the October Term, 1968 Petition for Writ of Certiorari, No. 1235.

The costs and attorney's fees were taxed against Hubbard by the Court of Appeals under 28 U. S. C. § 1927 (A. 33). There were no contempt charges of any kind filed against him. The costs and attorney's fees assessment were based on the fact that the appeals involving the two trials and the new trial order "could have been simplified or perhaps avoided but for the behavior of Hubbard" (A. 41).

QUESTIONS PRESENTED.

Was it not finally and conclusively decided in this Court's denial of certiorari in No. 1235 that the Court of Appeals Order taxing costs and attorney's fees against attorney Hubbard was justified on the record? Even a cursory comparison of the Petition for a Writ of Certiorari filed in No. 1235 and this Petition reveals all of the re-argument of the law of this case by the petitioner Hubbard.

Does the recent decision of *Mayberry* v. *Pennsylvania,* No. 121, 91 S. Ct. 499, 39 L. W. 4133, a criminal contempt case where the defendant was sentenced to 22 years imprisonment, have any effect on the power of the Court of Appeals to tax costs under 28 U. S. C. Sec. 1927 relating to the vexatious conduct of an attorney?

As we stated in our brief for respondent in opposition in No. 1235:

> "2. Can a trial lawyer of years of experience repeatedly make false statements to the court; attempt to improperly influence a jury by the introduction of statements not in evidence under the pretext of laying a foundation for impeachment but never carrying through; examine witnesses on an exhibit never offered

in evidence; repeatedly make known meriless objections both in trial and pretrial phases of he case for the purpose of harassment; delay and prolong the proceedings by falsely denying agreements previously made for depositions; secrete a deposition in his office and prevent its filing; allege inflammatory material in his opening statement and then never offer any proof of the same; cause the necessity of two trials of a personal injury by his actions, and then claim that he should not be liable for excessive costs?

3. Can the respondent Hubbard reasonably argue that his conduct is unintentional or accidental when in the second trial of this case he again engaged in shocking trial practices such as attempting to slip an excluded exhibit into the jury room when such exhibit was on numerous occasions ruled inadmissible by the court; repeatedly misquote portions of depositions to the jury leaving out material unfavorable to his client; misquote the transcript of the first trial record on cross-examination of a witness; filing an untimely abortive notice of appeal six months after the new trial order requiring plaintiff's counsel to file a short record on appeal with the Court of Appeals and to obtain by motion and briefs the dismissal of the abortive appeal; to be found guilty of misconduct in numerous other cases in the Illinois Appellate and Supreme Courts and the Court of Appeals and then claim that the new trial was granted in this case 'simply because it (the court) dislikes either the verdict or the lawyer?'

4. Does the phrase 'Independence of the Profession' offer a covenient word shield to those who seek to misuse the license of this honorable profession?

5. Is a lawyer entitled to a jury trial before the court may assess costs for his misconduct occurring in the presence of the court and imposed after notice, motion, hearing and briefs and not under civil or criminal contempt?

6. Is not the award of costs a proper method available to an aggrieved plaintiff to be made whole who has been put to additional costs and expenses by a defense lawyer engaged in blatant misconduct for the purpose of economically pulverizing the opposition by costly tactics?''

STATUTES AND RULES INVOLVED.

The following statutory and rule provisions, some of which are reprinted in Appendix A, involved are: U. S. C. § 1912 (Damages and Costs on Affirmance); 28 U. S. C. § 1927 (Counsel's liability for Excessive Costs); Federal Rules of Appellate Procedure, Rule 38 (Damages for Delay); Federal Rules of Appellate Procedure, Rule 39 (Costs).

STATEMENT OF THE CASE.

This case was a personal injury negligence case against the Las Vegas Hacienda Hotel. The Hacienda was defended by Petitioner Re[illegible]e Hubbard in both trials that occurred. The first trial was before District Judge Edwin Robson and resulted in a not guilty verdict for the defendant. Judge Robson granted a new trial based upon counsel Hubbard's trial misconduct and also ordered Hubbard to pay certain costs and attorney's fees to the plaintiff's attorneys (A. 11-18). At the second trial before District Judge Bernard M. Decker, Hubbard was again found to be engaged in unethical trial practices (A. 30-31). Nonetheless, the verdict in the second trial was a $100,000.00 award to the plaintiff for her injuries. Hubbard and Hacienda filed three appeals; one from the new trial order; one from the order granting fees and costs; and one from

the second trial verdict. The Court of Appeals upheld the new trial order; reversed in part the award of fees and costs; and upheld the $100,000.00 second trial verdict. In doing so, the Court of Appeals assessed costs and fees against Hubbard because of the "additional proceedings" caused by his misconduct (A. 14-36), 404 Fed. 2d 1163 at 1172:

> "The court further finds under 28 U. S. C. § 1927 that because of the additional proceedings caused by the conduct of Reese Hubbard, this matter is remanded to the trial judge for assessment of costs against Reese Hubbard for the expenses of printing plaintiff-appellee's 54-page brief and the additional Appendix in No. 15976 and a sum no greater than one-third (⅓) of plaintiff-appellee's attorneys' fee incurred in the appeal of cases numbered 15933, 15976, and 16210."

Hubbard then filed a Petition for Writ of Certiorari (No. 1235) to this Court. The Petition for the Writ was denied and a Petition for Rehearing on the denial of certiorari was also denied. In spite of this, Mr. Hubbard and his associates continued to cause "additional proceedings" in this case. After the denial of certiorari the cause was returned to District Judge Bernard M. Decker for the purpose of establishing a dollar amount for the one-third plaintiff's attorney's fees in accordance with the direction of the Court of Appeals. After examination of all the briefs filed in this case, Judge Decker found that $15,000.00 would have been a fair and reasonable fee for all of the appellate work done on these appeals. However, on September 23, 1969 he assessed an attorney's fee of $4,000.00 to be paid by the petitioner, Reese Hubbard (A. 46-46a). Hubbard then appealed to the Court of Appeals from this $4,000.00 judgment. On December 23, 1970 the Court of Appeals entered an Order affirming the judgment (A. 39-42).

ARGUMENT.

REASONS FOR NOT GRANTING THE WRIT.

ALL OF THE ISSUES RAISED BY THIS PETITION FOR CERTIORARI WERE DISPOSED OF IN THE DENIAL OF THE PETITION FOR WRIT OF CERTIORARI PREVIOUSLY FILED HERE OVER TWO YEARS AGO IN NO. 1235. THE SAME ISSUES ARE REARGUED IN THIS PETITION.

The denial of the Writ of Certiorari in No. 1235 should have settled once and for all the validity of the Court of Appeals Order taxing costs and attorney's fees under 28 U. S. C. § 1927 in this case. The Opinion of the Seventh Circuit Court of Appeals, 404 Fed. 2d 1163, set the costs and attorney's fees (one-third of the appeal attorney's fees) to be awarded the plaintiff's counsel as a result of the misconduct of attorney Reese Hubbard. It was *this* opinion that petitioner sought to have reviewed in his Petition for a Writ of Certiorari No. 1235. After the denial of this Petition, the case was remanded for the purpose of having the dollar amount determined by the District Judge (note: a judge different than the judge who granted the new trial and the costs and attorney's fees reversed by the Court of Appeals). After this dollar amount ($4,000.00) was determined by Judge Decker, Hubbard again appealed to the Seventh Circuit Court of Appeals and re-argued all of the issues and points that he had unsuccessfully asserted before this Court and on countless occasions below. The Court of Appeals in its Order of December 28, 1970 (A. 39) reestablished the validity of the prior Order for fees and costs. It is this Order that is now in issue on the

pending Petition for Writ of Certiorari, not the costs or attorney's fees originally allowed by Judge Robson after the first trial of this case, 39 F. R. D. 592-596 (A. 35-41). The Court of Appeals in approving the fees and costs taxed under the statute (28 U. S. C. § 1927) stated:

> "Hubbard once again attacks the validity of our assessment of attorney's fees on appeal as he also did before the Supreme Court in his Petition for Certiorari. We need not reconsider that issue since it is the law of the case. Nonetheless, we reaffirm the assessment we made in our prior opinion." (A. 40.)

Attorney Hubbard has now been held to have been guilty of professional misconduct in the two trials of this case by District Court Judge Robson (A. 11-18), District Court Judge Decker (A. 30-31) and twice by the Court of Appeals (A. 19-36, A. 39-42).

His trial tactics have been accurately described to fit into the following categories (A. 29):

"(1) Making misstatements of fact and law to the jury and the courts:

(2) Using harassing and obstructionist tactics in pretrial discovery:

(3) Injecting inflammatory statements into argument which were calculated to prejudice the jury; and

(4) Conducting improper cross-examination on matters not in evidence or on issue to which the Court had already sustained objection."

In the second trial of this case Hubbard tried to slip an exhibit into the jury room that had been repeatedly excluded from evidence (A. 31). In spite of all the findings herein, he persists in harassing plaintiff's counsel in seeking once again to have this matter reviewed by the Supreme Court. These tactics are dilatory. Judge Kerner obviously considered them as such when he entered the Order denying a stay of mandate on January 20, 1971.

A comparison of the "Questions Presented for the Court's consideration in Petition of Writ of Certiorari, No. 1235, and the same "Questions Presented" in this Petition No. 1498 clearly demonstrates that this is merely a re-argument of a case already decided.

No. 1235.

"1. Will not the independence of the bar be irreparably injured if, as here, months after a civil trial, a trial lawyer may be punished summarily for 'objectionable trial strategy by the trial judge through an award of costs' including attorney's fees, which was entered against the attorney:

(a) without giving him any advance notice of the charges to be defended;

(b) without permitting him any opportunity to confront and cross-examine his accusers;

(c) without allowing him any opportunity to present evidence corroborative of his factual statements made during trial; and

(d) without making specific findings of fact and conclusions of law which would determine the issues on appeal?"

No. 1498.

"1. May a federal judge, long after the trial of a civil case, summarily punish a trial lawyer for 'objectionable trial strategy' through a substantial judgment, under the guise of 'costs' without according that lawyer an evidentiary hearing as to disputed factual issues?"

"4. Is not a lawyer, accused of misconduct during the trial of a lawsuit, entitled as a matter of fairness, to:

(a) advance notice of the charges to be defended;

(b) an opportunity to confront and cross-examine his accusers;

(c) an opportunity to present evidence corroborative of his factual statements made during trial; and

(d) specific findings of fact and conclusions of law which would structure the issues on appeal."

No. 1235.

"2. May the strict limitations of constitutional due process, of the direct contempt statute, and of the summary contempt rule all be cavalierly swept aside, simply by changing the name of the proceeding from 'contempt' to 'costs', and by making the resulting award to opposing counsel rather than to the government as a 'fine?'" 18 U. S. C. § 401; F. R. Cr. Proc. 42(a).

No. 1498.

"5. Were not petitioner's rights violated although the proceeding was called 'costs' rather than 'contempt.'"

No. 1235.

"3. Was 28 U. S. C. § 1927 enacted to enable a federal court to ignore the foregoing limits on its power to punish a trial lawyer?"

No. 1498.

"2. Can 28 U. S. C. § 1927 be extended to authorize such a procedure?"

"6. Does 28 U. S. C. § 1927 create a new category of taxable 'costs' or does that section simply shift to an attorney the burden of paying such items as 'costs' as might otherwise be taxed to the client?"

No. 1235.

"7. Did not both courts below err in receiving statements from opinions in other cases, to which Reese Hubbard was not a party, as conclusive evidence of 'objectionable trial strategy' in this case?"

No. 1498.

"8. Was it not error, and a denial of due process, to receive opinions from several past cases, in which petitioner was not a party, as evidence of 'objectionable trial strategy?' Did not the Court of Appeals compound that error by basing its decision on matter which was neither urged to, nor relied on by the trial court?"

Thus, it is crystal clear that there are no new issues presented in this petition. Therefore, we will not reargue what has been resolved in the denial of the writ (No. 1235). We merely direct the Court's attention to our 41-page brief in opposition filed in No. 1235, which we incorporate by reference as part of this brief.

THIS CASE DOES NOT INVOLVE CIVIL OR CRIMINAL CONTEMPT. THE COSTS AND FEES WERE TAXED BY THE COURT OF APPEALS UNDER 28 U. S. C. § 1927.

Petitioner Hubbard has argued that *Mayberry* v. *State of Pennsylvania*, No. 121 (1/20/71) ..... U. S. ....., 91 S. Ct. 499, 39 L. W. 4133 has application to this case. The *Mayberry* decision does not apply here because it involves criminal contempt. This case does not involve criminal or civil contempt. Mr. Hubbard's conduct, correctly described as "outrageous in nature" by the Court of Appeals, consisted primarily of trial tactics which would deprive the plaintiff of her right to a fair trial. His misconduct consisted of serious and studied acts calculated to disrupt the

orderly processes of justice. He did not, however, act in an insulting or contemptuous manner toward the Court as in the *Mayberry* case. The trial court here never sought to punish Hubbard for contempt. The Court of Appeals assessed the costs and attorney's fees because Hubbard's conduct unduly extended the case and caused "additional proceedings." (A. 33.)

> "Both 28 U. S. C. § 1912 and § 1927 empower us to make such awards when an appeal is frivolous, creates delay or when the conduct of an attorney is deemed reprehensible" (A. 40-41).

Petitioner argues at great length about Judge Robson's Order assessing costs and fees. The fact of the matter is that this Order was reversed in part and remanded (A. 33-34). The Order taxing costs and attorney's fees now before the Court was made by the Court of Appeals and not by Judge Robson. There was certainly nothing of a personal nature or "insults of the kind apt to strike at the most vulnerable and human consciousness of a judge's temperament" as described in the *Mayberry* decision.

The award in the case at bar was neither criminal nor civil contempt, involved no fine and no stigma of contempt. It was purely remedial since its purpose was to make the plaintiff whole again for costs needlessly and futilely expended as a result of the misconduct of Attorney Reese Hubbard.

Significantly, the federal courts in civil contempt cases have consistently held that it is proper to assess attorneys' fees and costs as a compensatory remedy to restore the injured party to his former position. The civil contempt power to award a compensatory attorney's fees is also based on the inherent judicial powers of the court. There can be no doubt that Reese Hubbard's conduct could have formed a basis for civil contempt if such had been sought.

See Annotation 55 ALR 2d 979, "Allowance of Attorneys' Fees in Contempt Proceedings"; *Toledo Scale* v. *Computing Scale Co.*, 261 U. S. 399, 67 L. Ed. 719, affirming 281 F. 488 (7th Cir. 1923) (An award of reasonable attorneys' fees may in the discretion of the court be awarded in civil contempt); *Nelson* v. *Steiner*, 279 F. 2d 944 (CA-7, 1960); *Crane* v. *Gas Screw Happy Pappy*, 367 F. 2d 771 (CA-7, 1966) (The Court approved an award of $2,500 in attorneys' fees, expenses and damages, and also additional attorneys' fees and costs in the appeal); *Lance* v. *Plummer*, 353 F. 2d 585, 592 (CA-5, 1965) (Allowance of attorneys' fees and costs to injured party in civil contempt under the Civil Rights Act of 1964 was clearly compensatory and not improper as being punitive).

THE COURT OF APPEALS HAD AUTHORITY TO AWARD ATTORNEY'S FEES AND COSTS FOR THE MISCONDUCT OF HUBBARD.

The court of appeals had the power to award attorneys' fees, damages and interest in view of the conduct of Petitioner Hubbard. Federal Rules of Appellate Procedure No. 38 and 28 U. S. C. Sections 1912 and 1927 have been interpreted as authority.

The action of the Second Circuit recently in a case similar in conduct to the case at bar, clearly demonstrates the scope of this authority. In *Oscar Gruss & Son* v. *Lumberman's Mutual Casualty Company*, 422 F. 2d 1278 (CA-3, 1970), the court invoked the aforementioned authorities and awarded the plaintiff ten percent interest on his judgment, counsel fees of $7,500 on appeal and double costs. In so doing, the Court of Appeals stated:

> "In any event, on the basis of the conduct of the appeal alone, we regard this as an appropriate case for invoking both 28 U. S. C. § 1912, which provides:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

and F. R. A. P. 38, which states:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

In view of the superfluity of issues on appeal, the frivolity of almost all of them, and the briefing of many in a manner that simply ignored the abundant evidence supporting the determination of the jury and the judge, we exercise our discretion under the statute and rule as follows: Gruss is awarded an additional four per cent interest on the judgment appealed from, double costs on Lumbermens' appeal, and $7,500 in attorney's fees."

Courts of appeal have recognized their power to award attorneys' fees, double interest, damages and costs in cases of frivolous appeals or in the face of reprehensible conduct under the authority of Section 1912, and general powers. *In re Midland United Co.*, 141 F. 2d 692 (CA-3, 1944) ($1,000 attorneys' fees plus all costs); *Jones* v. *Schellenberger*, 225 F. 2d 784, 794-795 (CA-7, 1955), (Reprehensible conduct of defendant toward plaintiff); *Lowe* v. *Willacy*, 239 F. 2d 179 (CA-9, 1956) (Attorney's fees and costs awarded); *Dunscompe* v. *Sayle*, 340 F. 2d 311 (CA-5, 1965). cert. den. 382 U. S. 814 (1965). (Double costs awarded); *Ginsberg* v. *Stern*, 295 F. 2d 698 (CA-3, 1961) ($500 attorney's fees awarded).

The Notes of the Advisory Committee on Appellate Rules under F. R. A. P. 38 state regarding Section 1912 and Appellate Rule 38:

> ". . . the courts of appeal quite properly allow damages, *attorney's fees* and other expenses incurred by

> an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay". (Emphasis supplied.)

Petitioner's argument concerning the award to respondent here for the Court of Appeals brief printing and printing the additional appendix lacks force in view of the new Federal Rules of Appellate Procedure. Rule 39 in the absence of "misconduct" automatically allows such costs to the prevailing party. The petitioner makes no mention of this authorization in his Petition.

Petitioner's reliance on the authority of *Fleischman Corp.* v. *Maier Brewing*, 386 U. S. 714 (1967) is misplaced. The Court of Appeals in the case at bar readily pointed out as follows:

> "The case relied on by Hubbard, *Fleischman Corp.* v. *Maier Brewing*, 386 U. S. 714 (1967), itself recognized that attorney's fees could be awarded in exceptional circumstances and in the interests of justice." (A. 41.)

CONCLUSION.

In addition to the aforementioned reargument of all the issues decided in Petition for Writ of Certiorari, No. 1235, two years ago, a large portion of the present petition is dedicated to a renewal of the old argument made by Mr. Hubbard throughout these proceedings: that he was never really guilty of any professional misconduct in either this or any other case. We submit that it taxes the patience of this Court to again read through these arguments after all of the findings of misconduct by two Federal District Court Judges and by the Court of Appeals speaking through Judge Kerner. The actions of the petitioner are incredible but consistent with the prior opinion of the Court of Appeals which labeled them as "outrageous." Respondent's attorneys are a two-man law firm. Petitioner obviously

delights in throwing every possible roadblock and expense into the path of the respondent. Petitioner iss well aware that the expense incurred in the printing of tthis brief in opposition to the Petition for Certiorari is nott recoverable under the Supreme Court rules. We suggesst that petitioner's purpose in reapplying for a Writ oof Certiorari is to cause respondent and her attorneys untolld additional expense and brief writing time.

For the foregoing reasons it is respectfully prayed that the Petition for Writ of Certiorari filed by petititioner Reese Hubbard be denied.

Respectfully submitted,

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APPENDIX A.

STATUTES AND RULES.

UNITED STATES CODE:

28 U. S. C., § 1912 (Damages and Costs on Affirmance).
See Petitioner's Appendix A, p. 7.

28 U. S. C., § 1927 (Counsels' Liability for Excessive Costs).
See Petitioner's Appendix A, p. 9.

FEDERAL RULES OF APPELLATE PROCEDURE:

Rule 38. (Damages for Delay.)

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Rule 39. (Costs.)
See Petitioner's Appendix A, p. 4.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1498

REESE HUBBARD,

Petitioner,

vs.

DONNA M. KIEFEL,

Respondent.

REPLY BRIEF FOR PETITIONER, REESE HUBBARD.

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REPLY BRIEF FOR PETITIONER, REESE HUBBARD.

(Answering pp. 1-2.)

It is true that certiorari was denied at an interlocutory stage of these proceedings in 1969. But certiorari may have been denied because of the interlocutory character of these proceedings. This Court has often denied certiorari at an interlocutory stage, and then later granted it to review the entire proceedings, when ultimately there was a final judgment. See *e.g., Burnet* v. *J. Rodgers Flannery & Co.,* 286 U. S. 524, 52 S. Ct. 497, 76 L. Ed. 1268, *reversing* 3 Cir., 54 F. 2d 365; *Mercer* v. *Theriot,* 377 U. S. 152, 153-154, 12 L. Ed. 206, 208; *Stern & Gressman,* Supreme Court Practice (4th Ed. 1967), p. 27.

Indeed, in *Burnet,* the Court denied certiorari after the first appeal (282 U. S. 889, 51 S. Ct. 102, 75 L. Ed. 784). After the second appeal, this Court granted certiorari and summarily reversed both judgments of the Court of Ap-

peals (286 U. S. 524, 52 S. Ct. 497, 76 L. Ed. 1268). In so acting, this Court followed the very course which is appropriate in the decision at bar.

Further, there are new issues on this petition for certiorari. Our first ground for granting the writ (Petition, pp. 13-17), towit, the necessity of an "impartial court," having the "impersonal authority of law", arises out of this Court's very recent decision in *Mayberry* v. *State of Pennsylvania,* No. 121, 91 S. Ct. 499, 39 L. W. 4133 (1/20/1971).

Respondent's narrow restriction of that authority to contempt cases with 22 year prison sentences (Brief, pp. 2, 10-12) ignores the all-important constitutional principle of that decision. (Petition, pp. 13-17)

Similarly, our reason 4 (Petition, pp. 27-28) arises out of a judgment for $4,000 in attorneys' fees which was not entered until after this Court's denial of our earlier petition.

QUESTIONS PRESENTED.

(Answering pp. 2-4.)

The issues are correctly stated in the petition at pp. 2-4.

The principal charges of misconduct turn on evidence of events which took place outside the "actual presence," or the personal observation of the court, namely, in Las Vegas, Nevada.

The attempt to justify these summary proceedings, and thereby avoid the constitutional requirements of procedural due process, on the basis of the "personal observation of the court" exception utterly fails. If left to stand, the instant opinion would make a nullity of the fundamental constitutional requirements of confrontation, cross-examination, and an "evidentiary hearing" as to disputed factual issues before a court having the "impartial authority of law."

Such important constitutional rights can not turn on whether the proceeding is named "costs," rather than "contempt."

18 U. S. C., § 1927 was never intended to effect such a novel and unprecedented result.

STATEMENT OF THE CASE.

(Answering pp. 4-5.)

The pertinent facts are stated in the petition at pp. 4-5.

The petition omits to state (p. 4) that Judge Robson granted a new trial on February 28, 1966, and at that time, disqualified himself from proceeding further in the case. (A. 79) Only months later, on June 13, 1966, did plaintiff file her petition for costs and attorneys' fees. (A. 81) Hubbard promptly moved on July 5, 1966 that Judge Robson not hear this phase of the case. (A. 79) Judge Robson, on July 12, 1966, denied Hubbard's motion, and reentered the case for the limited purpose of granting plaintiff's petition. (A. 80)

Hubbard denied the charges against him, and demanded the right to confront and cross-examine his accusers, and to present corroborative evidence. (A. 82-83)

These requests were denied and judgment was entered summarily. (A. 83) The only evidentiary hearing had was on the amount of the judgment to be entered.

On October 24, 1966 the Court entered a judgment against Hubbard and his client for $6,100 in attorneys' fees and $2,071.56 as "costs." (A. 11-18)

On appeal the judgments were reversed in their entirety as to the client. The judgment for $6,100 in attorneys' fees against Hubbard, the lawyer, was reversed in its entirety. (A. 32) The judgment for "costs" against him was then reduced by $330.36, to a sum of $1,741.20.

The Court of Appeals then sought to restore some of the $6.430.36 cut from the judgment by awarding him $1,860.60 in printing costs. (A. 46) Further, the court made an un-

solicited remand of the case to the trial court to assess attorneys' fees in a sum not to exceed one-third of plaintiff's costs on appeal. (A. 33-34) On remand a judgment of $4,000 in attorneys' fees was entered against Hubbard, the petitioner. (A. 46-46a)

The reference (pp. 3, 4) to unproven charges from the second trial is improper for the reasons stated in the Petition at pp. 24-27.

The charges are analyzed and shown to be without merit at pp. A. III 53-61. (The reference A. III is to our Appendix [white] filed in the Court of Appeals on the second appeal: that document has been certified and filed as a part of the record herein.)

REASONS FOR GRANTING THE WRIT.

(Answering pp. 6-10.)

See pp. 1-2, *supra.* Of course, there is an overlapping of issues between the first and second petitions for certiorari. This is always true when there has been an unsuccessful attempt to obtain certiorari at an interlocutory stage. But, the very lack of finality of the judgment at that stage may have prompted denial of the writ. As noted above, p. 1, this Court has frequently denied review at an interlocutory stage only to grant it later, when the decision is final. *Burnet* v. *J. Rodgers Flannery & Co.,* 286 U. S. 524, 52 S. Ct. 497, 76 L. Ed. 1268, *reversing* 3 Cir., 54 F. 2d 365; *Mercer* v. *Theriot,* 377 U. S. 152, 153-154, 12 L. Ed. 206, 208; *Stern & Gressman,* Supreme Court Practice (4th Ed. 1967), p. 27.

The attempted reference (p. 7) to events occurring at the second trial is improper. (Petition, pp. 3-7) Hubbard did not attempt to "slip" anything into the jury room.* The charge is without foundation, and is simply an improper attempt to prejudice the Court against petitioner. It essays that very same type of change of theory of the case at the review level which was condemned in *Gregory* v. *City of Chicago,* 394 U. S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 734.

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* For full discussion of these charges see A. III 56-61 (included as part of the record).

ARGUMENT.

PETITIONER HAD A RIGHT TO AN EVIDENTIARY HEARING BEFORE A DIFFERENT COURT AS TO ALL DISPUTED FACTUAL ISSUES.

(Answering pp. 10-12).

Petitioner's constitutional right to see and confront witnesses on the contradicted factual issues and to present opposing witnesses is fully established by the authorities cited in the petition, pp. 17-24. *Willner* v. *Committee on Character & Fitness,* 373 U. S. 96, 103, 105, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 229, 231 (1963); *In re Oliver,* 333 U. S. 257, 259, 273, 275, 92 L. Ed. 682, 694, 695 (1948); *Greene* v. *McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959). See also *Berger* v. *Calif.,* 393 U. S. 314, 21 L. Ed. 2d 508, 89 S. Ct. 540, 541 (1969); *Barber* v. *Page,* 390 U. S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1969); *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965); *Holt* v. *Virginia,* 381 U. S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375 (1965); *In re Ruffalo,* 390 U. S. 544, 20 L. Ed. 117 (1968); *In re Murchison,* 349 U. S. 133, 99 L. Ed. 942, 75 S. Ct. 623. See also *Brotherhood of Loc. Fire & Eng.* v. *Bangor & Aroostock R. Co.,* 380 F. 2d 570, 581 (D. C. Cir. 1967).

This right is not limited to criminal cases, or contempt cases. But, it extends to any situation "where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him. * * * " *Wisconsin* v. *Constantineau,* No. 95, 91 S. Ct. 507, 39 L. W. 4128 (Jan. 29, 1971) (posting as a drunk); *Sniadich* v. *Family Finance Co.,* 395 U. S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969) (pre-judgment garnishment); *Goldberg* v.

Kelly, 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1969) (termination of welfare payments). See also *Breen* v. *Selective Service Board,* 396 U. S. 468, 24 L. Ed. 2d 653, 90 S. Ct. 661 (1970) (induction without hearing as punishment for draft delinquency).

None of the authorities relating to attorneys' fees in civil contempt proceedings (p. 12) is pertinent to the question of the power of a court to punish a trial attorney "for objectionable trial strategy," without according him an evidentiary hearing as to disputed factual issues.

None of the statutes cited (p. 11) is pertinent, for the reasons stated in petition, pp. 28-29. They relate solely to judgments which were affirmed. The judgment against petitioner for attorneys' fees was reversed, and the costs judgment was reduced substantially. (See pp. 4-5, *supra*)

Plaintiff can not simultaneously claim (p. 10) that "this case does not involve civil or criminal contempt," so that this Court's important decision in *Mayberry* v. *Pennsylvania,* No. 121 (1/20/71) ..... U. S. ....., 91 S. Ct. 499, 39 L. W. 4133 and Rule 42, F. R. Cr. P. do not apply, and urge civil contempt authorities (p. 12) as the foundation of the court's summary award of attorneys' fees. Plaintiff has attempted yet another change of theory of this case at the review level, in her attempt to sustain this novel and unprecedented award.

THE COURT'S AWARD OF ATTORNEYS' FEES IS WITHOUT AUTHORITY OR PRECEDENT.

(Answering pp. 12-14).

See pp. 27-29 of the Petition.

The attempt to characterize Hubbard's appeal as frivolous (pp. 12-13) is itself frivolous. As a result of his appeal, the award of $6,100 in attorneys' fees was reversed,

and the award of costs was reduced substantially. An appeal can not simultaneously be "frivolous", and substantially successful.

Nor did the Court of Appeals at any time attempt to justify its award of attorneys' fees against petitioner, on that basis. (A. 23-34) Reese Hubbard, the petitioner, was not the appellate lawyer in this case.

Plaintiff's cited authorities (pp. 12-14) are thus not relevant.

The sole basis of the award of attorneys' fees by Judge Robson, was his claim that Reese Hubbard had engaged in "objectionable trial strategy" requiring retrial of the case. (A. 11-18) That is the very basis, "the attorney's conduct, described previously" of the subsequent allowance of attorneys' fees against Hubbard by the Court of Appeals. (A. 25, 33)

Both awards are thus in direct conflict with this Court's decision in *Fleischmann Corp.* v. *Maier Brewing*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967).

CONCLUSION.

A short evidentiary hearing at which five people, Butterfield [the reporter], Singleton [the Las Vegas attorneys], Tracy [the operator], petitioner and plaintiff's counsel could have been examined and cross-examined would have resolved the very simple, but important, factual disputes of this case. (See Petition, pp. 8-13, 18-21, 33)

Petitioner is a widely-respected trial lawyer.

He ought as a simple matter of fairness and due process to have been given an evidentiary hearing, before a jury or different judge, to disprove the very serious charges against him.

For the foregoing reasons, certiorari should be granted, and the judgments, $1,741.20 in "costs," $1,860.00 in printing expenses, and $4,000.00 in attorneys' fees should be vacated, reversed and set aside.

Alternatively, petitioner prays that certiorari be granted, that the judgments be vacated, reversed and set aside, and that the cause be remanded for a proper evidentiary hearing.

Respectfully submitted,

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